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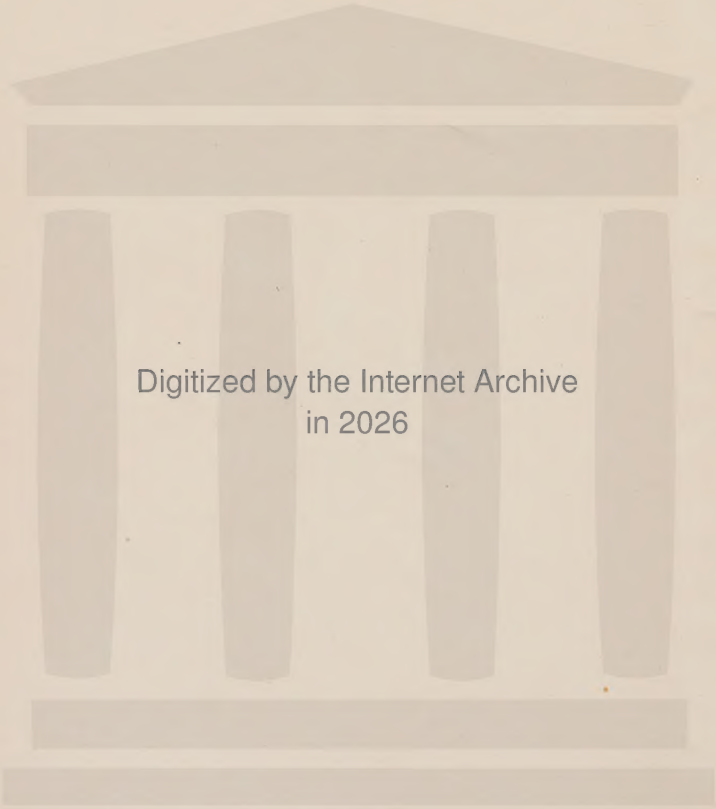

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RESPONSIBLE GOVERNMENT IN THE DOMINIONS

BY

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CHAPTER VIII

THE CONSTITUTIONAL RELATIONS OF THE HOUSES

A. THE NOMINEE UPPER HOUSES

§ 1. New South Wales

In the case of New South Wales attempts were made for a time to secure that the number of Legislative Councillors should be limited, so that the Upper House would not be in a position of complete inferiority to the Lower House. The members of the first Council were appointed in May 1856, and were to retain their seats for five years. It therefore devolved on the Governor in 1861, with the advice of the Executive Council, to appoint not less than twenty-one Legislative Councillors to hold seats for life.[1]

The Secretary of State addressed the Governor on the position in a dispatch of February 4, 1861. He pointed out that if each Government were to appoint as many nominees as it thought fit the Upper House would be swamped periodically, and could not fail to sink into a state of weakness and disrepute. He suggested, therefore, that the nominees of 1856 should be placed in the Council in 1861.

On May 21, 1861, the Governor reported on the position. Certain Land Bills had not been passed, and ministers desired to increase the number of the Legislative Council. On the 10th of May he found himself compelled either to accept the advice of the ministers or to break with them, backed as they were by six-sevenths of the Legislative Assembly and by the people; it was admitted on all hands to be impossible to form another Ministry and the

[1] See *Parl. Pap.*, H. C. 198, 1893–4, pp. 69–99. For this chapter, cf. Marriott, *Second Chambers*, pp. 131–52 (Canada), 153–81 (Australasia), 182–96 (South Africa); and Temperley, *Senates and Upper Chambers*.

Legislative Council was to expire on the following Monday. He accordingly nominated extra Councillors for the single night which the Council had to last, but the Opposition party resigned, and, as the President was in opposition and resigned with them, a House could not be formed and the new members were not sworn in, with the result that Parliament was prorogued and the Legislative Council as composed had ceased to have effect. On the 20th of July he reported that the Legislative Council had been reconstructed. The total number appointed was twenty-three, but it was agreed that the number was to be brought up to twenty-seven, which was taken as the complement not to be exceeded except under very special and unusual circumstances. All the members appointed, of whom twelve had been in the late Council, were of high standing and character, and the appointments had created a favourable impression.

The Secretary of State on July 26, 1861,[1] disapproved the action of the Governor in adopting a measure so violent and unconstitutional as to swamp the Legislative Council. The Governor should have resisted the attempt, and his resistance would have won a large amount of approval and support from the public opinion of the Colony; the procedure was not creditable to the cause of constitutional government in Australia, while tending to weaken the position of the Governor.

On February 16, 1865,[2] the Governor reported that the Colonial Secretary of New South Wales had resigned his office. About a fortnight previous to the meeting of Parliament, the Premier—Mr. Martin—had asked for two appointments to the Council; the Governor objected, and Mr. Martin did not appear to press his request, but Mr. Forster insisted on resigning. The Governor refused, because there were thirty-two members in the Council, and nine had been appointed since Mr. Martin's accession to office in October 1863. There was no need for further members. Moreover, the Government were not in a strong position, as a vote of want of confidence had been carried against them in October

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 74. [2] Ibid., p. 75.

1864, and though they had received a dissolution the result had not encouraged them. Moreover, the moment the new Parliament was opened a vote of want of confidence was carried by a majority of forty-two to fourteen. But he laid stress upon the argument that it was essential to maintain the strength of the Council, which otherwise would cease to have any independent position. A Governor should have a recognized independent discretion ; the nominations to the Upper House ought not to be viewed as mere appointments, the refusal to sanction which might justly be considered an interference with proper ministerial action and responsibility. Her Majesty's Government and the people of the Colony were entitled to hold the Governor responsible for securing the preservation of the Legislative Council as an efficient branch of the Legislature. The number had been fixed in 1861 at twenty-seven, not as absolutely rigid but as meeting the deliberate opinion of all parties then, and implying a sound principle. The Secretary of State in a dispatch of May 6, 1865, approved entirely the action of the Governor.

On September 29, 1868,[1] the Governor, Lord Belmore, reported that he had added three members to the Council owing to the difficulty of making up a quorum. In acknowledging the receipt of this dispatch on December 18, 1868, Lord Granville approved his action, but said that any increase of the number of the Council was likely to be used as a precedent for further additions, and was therefore to be regretted, and that he should have been glad to be assured that the addition was not in fact politically material as altering the balance in any important degree in favour of the Ministry by which it was suggested. Lord Belmore submitted this dispatch to his Prime Minister, who drew up a memorandum[2] on the question, in which he laid down that the dispatch was based on a misapprehension, and that the Government could not admit that the responsible ministers of the Governor might not advise an increase in the numbers. In law the number was unlimited, and the Secretary of State must have overlooked that fact, or he would not have questioned any

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 77. [2] Ibid., p. 79.

advice which might be offered by the responsible ministers so as practically to have the effect of nullifying without law in a material respect a most important constitutional principle, such as the right of extension of the Legislative Council. He pointed out that in the records of the discussions preceding responsible government, as shown by Mr. Wentworth's speech[1] on the third reading of the Constitution Bill, the view was that a nominee Upper House would be flexible and expansive, while an elective House would lead to a revolution, would control the Lower House, and trample on the rights of the people. The Ministry were entitled to advise an increase of members if they thought fit, and the Governor could refuse their advice if he thought fit and call other advisers, the propriety of his action depending on the justice and importance of the measure involved, the resistance of the Upper House to which would have led to the Government's recommendation of further nominations, on the amount and length of continuance of the obstruction of the Council, on the proportionate number and importance of the majority of the colonists demanding it, and on the depth and fervour of their determination in doing so.

In his reply of October 2, 1869,[2] Lord Granville said that he was aware that the number of the Upper House was legally unlimited, and that it might on critical occasions be indispensable to bring the two Houses into harmony by creating or threatening to create a sufficient number of councillors. But the whole value and character of the Upper House would be destroyed if every successive Ministry were at liberty to obtain a majority in that House by the creation of councillors.

There the matter rested until, by dispatch of August 10, 1872,[3] Governor Sir Hercules Robinson sent a minute of his Cabinet to be laid before the Secretary of State. The minute pointed out that the Government had come into office to secure the passing of the Border Duties Bill, whereas the appointments to the Council which had

[1] In December 1854; *Parl. Pap.*, H. C. 198, 1893-4, p. 80.
[2] Ibid., p. 81.
[3] Ibid., p. 87.

been made by Sir James Martin's Ministry, namely fifteen out of thirty-one, had had the result that the Council had defeated the Bill by nine against it to eight in favour of it. This result showed that the Government could not rely on passing useful measures. They were unwilling to take steps to swamp the Upper Chamber, but they could not accept the existing position, and they proposed to introduce a Bill to reconstruct the Council on an elective basis. They could not expect to carry their Bill if the Council were determined to oppose it, and therefore so long as the nominee principle existed they were determined to maintain the principle laid down by Mr. Wentworth. The minute ended by saying that 'While dutifully expressing their loyal attachment to the Throne and institutions of the Empire, your Excellency's advisers cannot, even by implication, consent to relinquish the smallest vestige of the liberties of this Colony, or concur in any rule or instruction at variance with the absolute right of its people to govern themselves in all matters within their own shores, as secured to them by the Constitution'. In a subsequent dispatch of August 27, 1872,[1] the Governor expressed his personal view on the situation. He considered that if further additions were made to the House—e. g. if it were increased to thirty-six in number, being one-half the number of the Assembly, it would furnish a precedent for future additions which it would be difficult to resist. He therefore considered that the principle of maintaining the House should not be altered.

The Secretary of State for the Colonies in his dispatch of November 29, 1872,[2] maintained the principle that the numbers ought really to be limited. He pointed out that it was doubtful whether a Legislative Council on an elective basis would not be more liable to come into collision with the representatives of the Assembly. He added that the maintenance of the rule to limit the numbers had been agreed upon to begin with in the Colony, and was in itself reasonable, and was not really being forced on the Colony by the Secretary of State. He trusted, therefore, that the Government would

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 94.

[2] Ibid., p. 98.

not insist on making a change, and as a matter of fact at that time the principle of limitation was still maintained.[1]

But it could not permanently be kept in force, and it broke down practically in 1888, when the Ministry of the day appointed, with Lord Carrington's permission, in ten months, twenty-two members. Lord Carrington was deemed by Sir C. Dilke to have been too devoted to the theory of ministerial responsibility. A protest against the appointments by the Opposition members of the Council and others was sent to the Governor, but no favourable reply was returned. This really ended the controversy,[2] and if Mr. (now Sir G.) Reid was refused an increase in September, 1894, he dissolved Parliament, was returned to power, and was allowed subsequently to make appointments; he carried his land-tax proposals by the fact that it was known that the Governor was prepared to add members to the Upper House if needed to carry the day, while in 1899 again federation was carried by the addition to the Upper House of twelve members. So in 1908 Mr. Wade received a large increase of members, though such increase was not needed to carry measures,[3] and indeed in 1909 the Upper House amended in very material particulars the governmental proposals for closer settlement by the compulsory division of private lands,[4] while in 1900 and 1901 it rejected women's suffrage Acts, and yielded in 1902 mainly because the Federal Parliament had bestowed the suffrage on women. It rejected an Income Tax Bill in 1893, and in 1895 a Land and Income Tax Assessment Bill.

In 1910 a proposal was brought forward by the Government of Mr. Wade that the Upper House should be given a more definite and effective position in the Parliament by limiting its numbers to some definite figure, say half the

[1] A proposal in 1876 to make the Upper House elective was negatived in the Lower House, very wisely.

[2] The situation is incorrectly stated by Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 67; *Parl. Pap.*, H. C. 70, 1889, p. 43.

[3] See the attack of the Labour party in *Parliamentary Debates*, 1908, Sess. 2, pp. 79 seq.

[4] See *Parliamentary Debates*, 1909, pp. 4305 seq.

number of the Lower House, and by making provision for the case of a deadlock, which it was recognized might arise if the existing position were disturbed.[1] The proposal was not received with satisfaction in the country, and on the defeat of the Wade Ministry it appears to have been definitely dropped. It is indeed natural that there should be no wish to strengthen an Upper House. Even with the possibility of swamping before it, the Upper House of 1909 had rejected proposals with regard to land put forward by the Government of Mr. Wade, and if its position were strengthened it is more probable that it would present serious difficulties in the way of progressive legislation than that it would effect any great service to the state. In the short second session of 1910 the Labour party had hardly any representatives in the Council, but the Council and Assembly did not disagree on any measure of importance. It is, however, the intention of the Labour party to abolish the Council if possible, and it will be expected of members appointed by the Labour party that they will agree to its abolition, though the device adopted in Nova Scotia and New Brunswick of asking a formal pledge will not (on the advice of Mr. Watson) be followed in this case.

§ 2. New Zealand

In the case of New Zealand disputes with regard to general legislation came to a head in 1891 and 1892.[2] In January 1891 Lord Onslow, on the advice of his ministers, added six members to the Legislative Council. His ministers had desired to reform the Council, but a Bill to reduce the period of nomination to seven years, and to limit its number to one-half of those in the House of Representatives, had failed in 1887 before it reached a second reading, and though in 1890 they supported a Bill which was introduced into the Council by a private member, it had been rejected by the

[1] See *Parliamentary Debates*, 1910, pp. 1844 seq. Cf. *Herald*, Feb. 15, 1911.

[2] See *Parl. Pap.*, H. C. 198, 1893–4. There had, of course, often been difficulties earlier; see Pember Reeves, *Long White Cloud*, pp. 372 seq.; *State Experiments in Australia and New Zealand*, i. 104 seq.; Dilke, *Problems of Greater Britain*, i. 424.

Council. Ministers were in a weak position, as the election which had just taken place had resulted in a change of feeling in the country, and he had demanded before he accepted their advice an assurance that their advice was given less to reward party services than to strengthen the Upper House. He had accepted their advice, although it was probably the case that they were in a minority, partly because the practice of giving rewards on the retirement of a Ministry was well known in England. In 1877, it was true, Lord Normanby declined to accept advice as to the appointment to the Council of Mr. Wilson while a vote of non-confidence in his ministers was pending, but on the vote being rejected he acted on the nomination of the Prime Minister. That action had been approved by the Secretary of State, but the circumstances were somewhat different, and he hoped his action also would be approved. In a further dispatch of January 24, 1891,[1] Lord Onslow reported that his ministers had asked for the appointment of not less than eleven councillors; the Premier had urged that the Governor should either accept their advice or dispense with their services, but he had finally induced them, with the assistance of Mr. Bryce, formerly Minister for Native Affairs, and their most prominent supporter in the House of Representatives, to retain office on his making six appointments on the strength of a formal assurance that these names were recommended solely to add strength to the House and not for party purposes. On the other hand, a petition was presented by forty members of the House of Representatives, asking that no more members of the Council should be appointed until after the meeting of Parliament, although the appointments had already been made on January 20. He explained that he had not felt justified in refusing the advice of his ministers in a matter which concerned the Colony alone, which neither affected the royal prerogative of mercy nor the question of an appeal to the people, and was in consonance with accepted constitutional practice. It was not seriously maintained that his action was unconstitutional, in view of the English practice, but there was

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 15.

a strong feeling in the Colony that the practice of making appointments before vacating office was not one which New Zealand Governments should be encouraged to follow. In a democratic country punishment follows on wrong advice through the action of the people, and it was not necessary for the Governor to take such a strong step as refusing advice. In a dispatch of April 11, 1891,[1] Lord Knutsford said :—

With regard to the appointments to the Legislative Council recommended by the late Government, I am of opinion that, in accepting the advice tendered to you by your Lordship's responsible ministers, under the circumstances described in your dispatches, you acted strictly in accordance with the constitution of the Colony, but I do not desire to be understood to offer any opinion upon the action of your ministers in tendering such advice.

On June 22, 1892,[2] Lord Glasgow reported that his ministers desired to increase the Legislative Council by twelve members, while he himself was prepared to concede the appointment of nine. They had a good majority in the House of Representatives, but in the Legislative Council the Attorney-General, the only minister in that Chamber, had only four or five members to help him.

Mr. Ballance did not wish to swamp the Council, but only to have a certain amount of debating power there. Lord Glasgow was willing to concede nine members ; if he conceded more he would run the risk of making the Council a mere echo of the other House ; if it were to have no opinion of its own it was of no use, but if it preserved its liberty and gave the country time to reconsider questions it might be of invaluable service to the Colony. In a telegraphic reply of August 10, 1892,[3] Lord Knutsford pointed out that the Council consisted of thirty-one Opposition members and five of the Ministry, while if twelve were added to the latter the Opposition would still remain, and therefore the proposal of the Premier would seem to be reasonable—the existence of an Upper House might be imperilled unless a more even balance of parties were secured. In a dispatch of August 8,

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 14.
[2] Ibid., p. 14.
[3] Ibid., p. 16.

1892,[1] the Governor sent home a reference from his ministers, in which they appealed to the Secretary of State for a decision between them and the Governor on the question at issue. The Ministry in this memorandum mentioned the facts and pointed out that the Governor had declined to accept their recommendation, though offering to appoint nine members. They proceeded :—

Ministers would point out that the Parliament is in session, and they are answerable to the House of Representatives for the advice tendered to his Excellency. It has been alleged that they ought to have resigned when their advice was declined, but they relied on the constitutional practice as expressed in Todd's *Parliamentary Government in the British Colonies*, 1880, p. 590, which is as follows : 'They would be responsible for the advice they gave, but could not strictly be held accountable for their advice not having prevailed ; for, if it be the right and duty of the Governor to act in any case contrary to the advice of his ministers, they cannot be held responsible for his action, and should not feel themselves justified in retiring from the administration of public affairs.'

Ministers are of opinion that the responsibility of appointments to the Council should have rested with the responsible advisers of his Excellency, and that the refusal to accept their advice is in derogation of the rights and privileges of a self-governing Colony. In this case his Excellency is placed in the position of acting without advice, unless it be the advice of persons who are not responsible, and withdraws from those responsible the confidence which the constitution requires him to repose in them, upon the inadequate ground that nine are preferable to twelve additions to the Council.

It is further to be observed that while the advice of a Government that had just been defeated at a general election was accepted, the advice of a Ministry enjoying the confidence of a large majority of the representatives of the people is declined. Ministers, in fact, are impelled to the conclusion that the way in which their advice has been treated is more in harmony with the methods of a Crown Colony than with the practice followed in a great self-governing Colony which has long enjoyed the advantages of a free constitution and a wide autonomy within the limits of the Empire.

The Governor in his covering dispatch argued that it was

[1] *Parl. Pap.*, H.C. 198, 1893–4, p. 17.

essential to maintain the balance of the constitution. He suggested that if a measure were thrown out in the Council the Ministry could appeal to the people, and if re-elected the Council might either yield, or a sufficient emergency would have arisen to justify the Governor granting ministers a sufficient number of nominations to bring the Upper House into harmony with the country. He quoted in his favour the recommendation of forbearance between Houses of Parliament in a dispatch from Lord John Russell of October 19, 1839, and Lord Granville's dispatch to Lord Belmore of October 2, 1869, dealing with a similar question in New South Wales. He suggested that the strength of the Council should bear a fixed proportion to the House of Representatives, but that a clause should be inserted in an Act to amend the constitution giving the Governor power to bring the Council into harmony with the country by fresh appointments on the advice of ministers on an emergency. The decision of the Secretary of State was conveyed to the Governor in a telegram of the 24th of September, in which he advised him without hesitation to accept the advice of ministers, and asked him to re-open the matter and waive his objections. In a dispatch of September 26, 1892,[1] he laid down at greater length the position. He pointed out that no case of swamping really arose, as there was no question of overthrowing the balance of party altogether. The difference between the number the Governor was ready to appoint and the twelve asked for was too small to justify the Governor assuming the very serious responsibility of declining to act on the advice of his ministers, and possibly of having in consequence to find other advisers. He added—

I have therefore dealt with the merits of the particular case on which my advice has been sought. But I think it right to add that a question of this kind, though in itself of purely local importance, presents also a constitutional aspect which should be considered on broad principles of general application.

When questions of a constitutional character are involved, it is especially, I conceive, the right of the Governor fully

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 37.

to discuss with his ministers the desirability of any particular course that may be pressed upon him for his adoption. He should frankly state the objections, if any, which may occur to him, but if, after full discussion, ministers determine to press upon him the advice which they have already tendered, the Governor should, as a general rule, and when Imperial interests are not affected, accept that advice, bearing in mind that the responsibility rests with the ministers, who are answerable to the Legislature and, in the last resort, to the country.

A Governor would, however, be justified in taking another course if he should be satisfied that the policy recommended to him is not only, in his view, erroneous in itself, but such as he has solid grounds for believing, from his local knowledge, would not be endorsed by the Legislature or by the constituencies.

In so extreme a case as this, he must be prepared to accept the grave responsibility of seeking other advisers; and, I need hardly add, very strong reasons would be necessary to justify so exceptional a course on the part of the Governor.

A reply was sent to this dispatch on December 3, 1892,[1] by Lord Glasgow. He maintained the position that an appeal to the Colonial Office was not a natural step to be taken by a Ministry with a proper conception of the rights and privileges of a self-governing Colony and urged that it was their duty to resign or to give way, and not to act as they had done in this case. He summed up his opinion in the view that the practice of referring to the Colonial Office differences between Colonial Governors and ministries of the calibre at least of the one in question, was not one to be encouraged, in as much as the great Colonies all possessed the inestimable boon of self-government as fully and freely as did the Mother Country. The Secretary of State acknowledged the receipt of this dispatch in a dispatch of February 17, 1893. He thought that the objection to a reference home had come too late, and should have been made earlier, before the reference actually took place. He had not sought the reference, but he would not be justified in refusing an expression of his view when it was asked for by the Governor of the Colony or by his constitutional

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 42.

advisers. If ministers were unable to agree with the Governor they must in the last resort resign, but it was for them to decide whether they should take this step, and they had preferred to refer the matter to the Secretary of State.

Since that time there have been no serious differences between the two Houses in New Zealand. An Act of 1891 limits the tenure of office of all new members to seven years, and this, together with the continuation in office of ministries favourable to the view of Mr. Ballance, has resulted in the gradual harmony of the Council with the Lower House. It is recognized that the Council is unable to resist the Lower House, and all the important and most democratic social legislation[1] of New Zealand since 1900 has been passed without serious difficulties from the Upper House, which has, however, served the useful purpose of amending these measures in detail. In fact, the Upper House of New Zealand appears now to serve adequately the useful purposes of an Upper House, but of course the position there is rendered simple by the fact that the great majority of the people are politically in sympathy with the Government, and that the Opposition does not differ from the Government on matters of fundamental importance.

There have naturally been various discussions as to the possibility of strengthening the Upper House, and several members of Parliament have time after time introduced motions in favour of making it elective.[2] There is not, however, as far as can be seen, any real desire on the part of the people and the country that this step should be taken, and there are obviously strong objections to complicating the machinery of legislation, at any rate in a democratic country, and especially in a Dominion which has as yet no serious questions of external affairs to trouble it.

[1] e.g. old-age pensions in 1898, conciliation and arbitration in 1900. The period up to 1899 saw a good deal of alteration and even rejection of land and industrial legislation, as shown by Pember Reeves in *State Experiments in Australia and New Zealand*. But the decade 1901–10 tells of constant increase in the power of the Lower House.

[2] See e.g. *Parliamentary Debates*, 1907, cxxxix. 276–303. A proposal to this effect is a fairly constant feature of the parliamentary session.

§ 3. Queensland

In the case of general legislation in Queensland matters came to a head at the end of 1907.[1] The Ministry of that day—Mr. Kidston's—commanded some twenty-four members in the Legislative Assembly. There were in coalition with him seventeen Labour members and an Opposition which numbered thirty-one members. The coalition was fairly close, but not, of course, perfect. The Legislative Council in that session rejected two measures sent up from the Lower House, namely a measure to abolish postal voting and a measure to establish wages boards. The postal voting measure had been introduced because of the feeling that the postal vote enabled influence to be brought to bear on the voters, more especially women, and that the result of this influence was beneficial to the party in opposition. The Wages Board Bill was obnoxious to the Opposition because of its attempt to apply its terms to agricultural pursuits—a matter of considerable importance in a country like Queensland. Mr. Kidston was anxious to obtain assurances from the Governor that if the Upper House persisted in its opposition he would sanction the addition of sufficient members to overcome that opposition. It was not desired to exercise this power if it could be avoided; the idea rather was that by the Governor letting it be known that he would be prepared to accept advice the necessity of the advice being tendered would be avoided. To this, of course, there was no constitutional objection; indeed it was in exact accordance with the step taken in England at the time of the passing of the Reform Act of 1832. But the Governor felt unable to accept the advice of the Ministry, and accordingly Mr. Kidston resigned, and the Governor sent at once for Mr. Philp, the leader of the Opposition, and asked him to form a Ministry. Mr. Philp did so, but in the Lower House he found himself unable to obtain supply. The majority in that House protested that a change of Ministry was undesirable, that they were willing to proceed with

[1] See *Parliamentary Debates*, c. 1735 seq.; ci. 38 seq.

business and to pass very important railway Bills, but not so long as Mr. Philp was in charge of the Government. Mr. Kidston maintained that it was essential that the Upper House should be compelled to yield to the wishes of the Lower House, while the Premier maintained that the Upper House was entitled to throw out Bills unless they were certain that the country approved them. Accordingly Mr. Kidston's amendment in Committee of Supply, that the Chairman should leave the chair and report no progress, was carried by the coalition vote of thirty-seven to twenty-nine. The Government then saw that it was impossible to proceed, and on November 20[1] Mr. Philp announced that instead of resigning they had decided to ask the Governor for a dissolution, and that the Governor had granted a dissolution. He moved to adjourn the House, but was defeated by thirty-seven to twenty-six, whereupon Mr. Kidston proposed that the House should adjourn until the next Friday. Mr. Kidston protested against the action of the Government in not resigning. The leader of the Labour party most energetically attacked the Governor for his action, but the Speaker pointed out that he must not make personal allusion to His Excellency. If he wished to criticize the advice which was tendered to His Excellency he would be in order in doing so.[2] It was pointed out by another member, Mr. Bell, that Mr. Kidston could have adopted the procedure of Mr. Ballance and asked the Governor to refer home for instructions, but he had taken a more considerate course and tendered his resignation, with the result that the new Government had been proved not to have the confidence of the House.[3]

On the 22nd of November Mr. Kidston moved an amendment for an address to the Governor with regard to the political situation. The address pointed out that the Assembly was elected on May 18, 1907, and was a most recent expression of the will of the country; that for four years the Legislative Council had obstructed measures

[1] *Parliamentary Debates*, c. 1756 seq.

[2] Ibid., p. 1761.

[3] Ibid., p. 1763.

sent up by the House, so that it was essential to find a remedy; that with this object in view the Kidston Ministry advised the Governor to recognize the principle that the Crown had the power to nominate to the Legislative Council such number of new members as might be required to overcome obstruction, and that such power should be exercised if in the opinion of the Ministry such a course became necessary; that on the Governor declining to accept this advice the Ministry resigned, Mr. Philp formed a Ministry, and on the 12th of November, met the House which refused to adjourn and next day passed a resolution disapproving the contemplated change in the Ministry. It went on to point out that the House was constrained by the necessity of the duty it owed to the people of Queensland to refuse supply, and had done so on the 19th and 20th of November. The Kidston Ministry had never been defeated, and still commanded the support of a majority of the whole of the members of the House. It was quite possible to carry on the administration, and it was probably unprecedented in any self-governing state of the Empire that a House fresh from the people should be dissolved. Moreover, it was highly inadvisable that a dissolution of Parliament, suspending Bills dealing with railway and public works, should take place at that season of the year, entailing distress to thousands of workers. The House therefore prayed the Governor to refrain from the exercise of his prerogative. The address was discussed at great length and with considerable violence of expression. Most of the cases on the subject were reviewed, and stress was laid, on the one hand, on the impropriety of dissolving a Parliament without supply, and on the other hand, on the fact that it was impossible to leave in the hands of the House the question whether it should be dissolved or not by giving a right to the House to prevent dissolution by the refusal of supply. Eventually the address was carried by thirty-seven votes to twenty-seven. It was presented to the Governor, who sent the following reply, dated November 22;

I do not propose to answer the points of your address *seriatim*, but shall briefly put before you the position as I see it.

The paragraphs 2, 3, and 4 of your address deal with the constitutional position of the Upper House.

That is the great constitutional issue with which my late Premier invited me to deal.

I declined, because I considered the matter too grave for a Governor to touch without a mandate from the people.

By the exercise of the prerogative of dissolution the people are asked to say what they wish done.

I fully recognize the inadvisableness of frequent general elections. I appreciate the peculiar inconveniences of an election at this time, but I regard it as of paramount importance that the country should speak its mind on this question, and therefore I have to decline the prayer of your address.

I recognize to the full the responsibility I have taken on my shoulders, throughout this disturbed political period.

From time to time, under the constitution, a Governor has to take responsibility, but I cannot shirk it when laid upon me.

The reading of the reply in the House caused a somewhat violent explosion of wrath, the ex-Prime Minister remarking[1]: 'This is a somewhat extraordinary position. His Excellency has turned down his thumb. The Czar has dismissed the Duma. And now this matter is for the people of Queensland.' He proceeded later on to say that :—

For centuries it has been recognized that the King of England, and in his self-governing dependencies the representative of the King, had no right to govern at all, had no right to use the people's money, except to govern and use the public moneys in accordance with the wishes and opinions of the representatives of the people. That is constitutional government, that is self-government, and to claim anything else for the King or a Governor is to set up the claim that cost Charles I his head.

The dissolution proceeded, with the result that Mr. Philp's Ministry was crushingly defeated in the country, having only twenty-five members out of a House of seventy-two, while Mr. Kidston had twenty-five supporters, and

[1] *Parliamentary Debates*, c. 1783.

the remaining members were Labour, and were united in feeling with Mr. Kidston. Mr. Philp therefore resigned before Parliament met, and Mr. Kidston took office again, and naturally the address in reply to the Governor's speech was devoted to a criticism of his action in dissolving the Parliament contrary to the request of the Assembly. Moreover, it had been necessary to spend a very large sum of money, £687,000, without legislative appropriation in the interval, and threats were freely uttered that the expenditure would not be sanctioned. Political events, however, led to a change in the position ;[1] Mr. Kidston's alliance with the Labour party was unsteady, and it became necessary to consider a coalition with Mr. Philp's followers. The result was seen in the passing at the end of the session, in a very inconspicuous manner which escaped the notice of the Labour members, of an appropriation to make good the sums expended during the period of Mr. Philp's Ministry, and the adoption of an Act, No. 16, providing for a referendum in case of difference of opinion between the two Houses, in place of swamping the Council. On the other hand, the Council showed its change of spirit by accepting the legislation of the Ministry without further demur, and in particular it passed the Bill for the referendum, though by a narrow majority, and in 1910 it accepted in substance a very elaborate Government programme. The relations of the Houses may thus be said to be settled on a new basis ; no doubt it is still legally open to the Government of the day to ask the Governor to swamp the Council, but such a course would hardly be approved in view of the new position as provided in the Referendum Act.

§ 4. Natal, Transvaal, Orange River Colony

In the case of Natal the period of the existence of the Upper House, seventeen years only, was too short to enable it to develop an individuality of its own, and it was decidedly

[1] The postal vote was, however, abandoned by Act No. 5, and a Wages Boards Act (No. 8) passed in wide terms. For the coalition, see *Parliamentary Debates*, cii. 28 seq.

lacking in characteristic features. It on various occasions amended Bills, and on one occasion, in 1905, it rejected an Act to provide for native taxation, insisting instead on a poll-tax on the whole of the people of Natal, though that was in fact merely an indirect way of increasing native taxation without resorting to differential measures such as would have rendered it essential for the Governor to reserve his assent to the measure, a course which it was naturally desirable to avoid. The House could not be swamped as its members were limited, and its long tenure of office and the property franchise rendered it a respectable body, but it was hardly distinguished by any marked statesmanship. In the two new Colonies also the Upper House was limited in numbers and so could not be swamped. No serious difficulties arose during their brief existence: the Upper House of the Transvaal insisted on its right to be given adequate time to discuss measures, and claimed, but in vain, a right to criticize non-appropriation clauses of money Bills. In the matter of the presentation of the Cullinan diamond to the King it was alleged that the Upper House was only induced to accept the measure by two of its members receiving Government appointments, and thus enabling the Government to fill their places by supporters of the measure.

§ 5. Canada

In the case of Canada the principle of nomination has not been a success, though the principle of election has equally been a failure. Lord Elgin, when Governor-General, thought that the difficulty of governing was much increased by the lack of harmony between the two Houses, and he strongly recommended, and ultimately persuaded, the Imperial Government to consent to the Upper House in the Union being made elective.[1] But the experiment was certainly not a success, and when it was decided to constitute a

[1] See Walrond, *Letters and Journals of Lord Elgin*, pp. 145 seq. See the Act 17 & 18 Vict. c. 118; *Hansard*, ser. 3, cxxxiv. 159. The Canadian Act was 19 & 20 Vict. c. 140. For the Speaker, cf. 22 & 23 Vict. c. 10 and the Canada Act, 23 Vict. c. 3. For Sir J. Macdonald's views, see Pope, i. 277; ii. 233 seq.

Dominion it was agreed that it should not be perpetuated, and the Upper House was accordingly made a nominee body. As a nominee body it has failed, as every Upper House in North America has failed, to command the respect of the people.[1] Certain differences of opinion arose between the two Houses when Sir John Macdonald's Ministry went out of office in 1873, and the Liberal Opposition came into power with only seven members, of whom three were doubtful, in the Senate; for example, the two Houses took different views as to the conduct of Mr. Luc Letellier de St. Just, the Lieutenant-Governor of Quebec, in 1878, and the proposal for the building of the Esquimalt-Nanaimo Railway.[2] Harmony was restored by the recovery of power by Sir John Macdonald in 1878, and the amicable relations of the two Houses were not disturbed until the defeat of Macdonald's successor in 1896, when the strong disparity between the two Houses became obvious, the Senate consisting almost entirely of members nominated[3] at one time or another by Sir John Macdonald, as was inevitable in view of the facts that he had twice held office and that senators were nominated for life. In 1897 and 1898 there was some friction; several Bills were altered against the wish of the Lower House, the Bills for an extension of the intercolonial railway to Montreal and for a railway to the Klondike were rejected[4] and a redistribution measure was blocked. Proposals for reconstructing the Upper House on an elective basis have been aired from time to time, and the former Secretary of State for the Dominion, Sir Richard Scott, on going out of ministerial office introduced a Bill into the Senate to secure its reform.[5] No serious step, however,

[1] Goldwin Smith, *Canada*, pp. 163 seq.

[2] Canada *Sess. Pap.*, 1876, No. 41, p. 2.

[3] On strictly party lines: Sir J. Macdonald only once, it is said, nominated a Liberal, and Sir W. Laurier never a Conservative.

[4] See *Senate Debates*, 1897, pp. 735 seq.; 1898, pp. 280 seq.

[5] See a summary of the 1908 debates in *Canadian Annual Review*, 1908, pp. 34–6; *House of Commons Debates*, 1909, p. 1473. It was discussed at great length again in 1910, see *Debates*, 1909–10, pp. 2040 seq., and in 1911, *Debates* 1910–1, pp. 2738 seq.; *Review*, 1910, pp. 255, 256.

has been taken in the matter; the constitution of the Senate can only be changed by the action of the Imperial Parliament, and there is not sufficient evidence that the feeling in Canada is sufficiently strong in favour of the setting up of a House with any real powers. Reformers are hopelessly divided as to the basis of reform, whether elective by constituencies larger than those for the House of Commons or by the provincial parliaments, or nominative by the provincial governments or parliaments, or a combination of methods, and the duration of membership, and so forth. There is also a section in favour of abolition, the royal veto being adequate.

Sir W. Laurier's latest expression[1] of his view insists on the disadvantage of substituting an Imperial veto for a Senate. The veto is necessary for Imperial interests, just as the veto over provincial legislation is used to prevent interference with the policy of Canada and Imperial interests at large. He himself thought that the rejection of the Yukon railway scheme was a fatal error, and he was prepared for reform. But he found no basis of agreement; he thought a twelve or fifteen years' tenure might be better; elections he deprecated and believed no one to favour; he had once favoured election by the local legislatures, but the recent history of the United States Senate had cooled his ardour in that direction. Still he thought that a Senate partly so elected and partly nominated might be a satisfactory body, for it would give the representation of different schools of thought. For the Opposition[2] Mr. Foster thought a period of seven or ten years' service was enough, and advocated election by large constituencies and on a proportional basis (to secure a Government majority in proportion to the real voting power of the Government in the country). Then there should be a limited number of nominees—twelve or fifteen—to represent different interests, banking, agriculture, forestry, fishery, science, universities, and labour. It was, however, admitted on all sides that the Senate did

[1] *House of Commons Debates*, 1910–1, pp. 2768 seq.

[2] Ibid., 2780 seq.

nothing to protect provincial interests, but that it was less partisan than the Lower House.

On the other hand, Sir R. Cartwright in the Senate pressed for an elective senate and for further work ;[1] more Bills to be originated there, and under-secretaries to sit there, the number of ministers to be limited accordingly.

Harmony[2] is again prevalent, thanks to the long administration of the Liberal Government, fifty senators, Conservatives, having died and been replaced by Liberals since 1896, and there is certainly no desire in Canada for any House which should seriously interfere with the powers of the existing House of Commons. Provision is contained in the *British North America Act* under which, if at any time on the recommendation of the Governor-General the King thinks fit to direct that three or six members be added to the Senate, the Governor-General may by summons to three or six qualified persons, as the case may be, representing equally the three divisions of Canada (that is Ontario, Quebec, and the Maritime Provinces), add to the Senate accordingly. But in the case of such addition being at any time made the Governor-General shall not summon any person to the Senate except on a further like direction from the King on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more. This provision has never been exercised, and it has been actually laid down, on the one occasion when its use was suggested in Mr. Mackenzie's administration, that it is a power which is only intended to be used on a very extraordinary occasion, when parties are nearly equal, to bring about a settlement of some important dispute. In that case the application made, which was due to the great disparity between the two

[1] *Senate Debates*, 1911, pp. 252 seq.

[2] For a case of an important amendment cf. *House of Commons Debates*, 1909, pp. 6444 seq. It is said to have rejected ninety-seven Bills since federation, and Mr. Lancaster, in his attack on it on January 30, 1911, asserted that it had blocked a railway Bill to compel railways to protect level crossings for seven years, and eventually only accepted it in a mutilated form.

parties in the Senate when Mr. Mackenzie's Government took office, was courteously but firmly declined, and no subsequent occasion has ever arisen in which it has even been discussed.[1]

The two nominee Houses of Quebec and Nova Scotia are hardly distinguished by any marked statesmanship. They are not liable to be swamped,[2] but on the other hand, the example of the Canadian Parliament, in which the Senate possesses only a weak position, has reacted upon them and has effectually prevented their obtaining any great strength. On the other hand, they still exist, owing to the facts that they are not prepared to surrender their existence, and that it is impossible to overcome that resistance by any constitutional means. The only way of doing so would be a wholesale dismissal of members by the Lieutenant-Governor, and such a proceeding would be altogether illegal and improper. In the case of Quebec it does not, indeed, seem that it is possible to remove them, as they are appointed for life under the Great Seal, but a legislative councillor may lose his position by various contingencies, as in the case of a senator.

In the case of Nova Scotia[3] the Upper House has still maintained its existence despite the general tendency which has been seen in Manitoba,[4] New Brunswick,[5] and Prince Edward Island[6] for the Legislatures to reduce themselves to single-chamber assemblies. The constitution of the Council is very curious. It was created in 1758 by the commission to the Governor which authorized him to make laws with the Council and with the House of Assembly. The

[1] See *Senate Journals*, 1877, pp. 130, 174. The correspondence was then laid before the Senate, which passed a resolution asserting that the power should only be used for emergencies, to bring about harmony between the two Houses. Cf. *Senate Debates*, 1898, p. 403.

[2] The number is limited in Quebec by 30 Vict. c. 3, s. 72, in Nova Scotia by the old royal instructions maintained in force by the same Act, s. 88.

[3] See Bourinot, *Transactions of the Royal Society of Canada*, II. ii. 143 seq.

[4] In 1876; see *Provincial Legislation*, 1867–95, pp. 808 seq.

[5] In 1891. For its demerits, see Hannay, *New Brunswick*, *passim*. In pre-responsible government days it used repeatedly to reject Appropriation Bills.

[6] In 1893; see *Provincial Legislation*, 1867–95, pp. 1221 seq.

Council exercised executive as well as legislative functions right down to 1838, when the Council was separated into two bodies, an Executive Council and a Legislative Council. Before that time the Upper House had become very unpopular, and in 1837 an address was sent to the Queen praying for the grant of an elective Legislative Council. The position was indeed anomalous, and Judge Haliburton in 1829 had pointed out that it was desirable to make the Council independent of the Governor, who had then not only the power of nomination but of suspension, and to confine it to legislative functions. He laid stress on the anomaly of the same persons passing a law as the Legislative Council, and then in their capacity as the Executive Council sitting in judgement on their own Act and advising the Governor to assent to it.

The instructions to Lord Durham of 1838 accordingly, in appointing him Governor-in-Chief, provided for an Executive Council not to exceed nine in number, and for a Legislative Council, the number of whom residing in the province was not, by appointment by the officer administering the Government, to exceed fifteen. As a matter of fact, it was not the Governor-General, but the Lieutenant-Governor who carried on the administration.

In 1845 the Legislative Council asked that it should be remodelled so as to have a defined constitution, with payment of members, and they also desired that members should hold by a clearly defined tenure. Lord Stanley replied in a dispatch to Lord Falkland, the Lieutenant-Governor, of August 20, 1845. He stated that he was willing to adopt for Nova Scotia the same rule as had been adopted in New Brunswick,[1] under which the seats of members were vacated either in the case of bankruptcy,

[1] In New Brunswick the number of members was increased in the commission to Lord Monk to twenty-three as a maximum by local appointment, the total being unlimited as far as appointments by the Imperial Government were concerned. On federation an Act (c. 30) of 1868 limited the number to eighteen and vested the appointment in the Lieutenant-Governor in Council; Hannay, ii. 278.

insolvency, the conviction for an infamous crime, or on a member absenting himself after a prescribed period. On condition that these principles were adopted the Crown would be prepared to accede to the suggestion for a permanent tenure. He did not think such a tenure should be laid down by the authority of Parliament, as it was clearly a matter within the royal prerogative, and he conveyed Her Majesty's approval of the proposed alteration in the tenure of office. It is clear from the resolution passed by the Legislative Council on January 13, 1846, that they understood the concession to be life tenure and also, as in New Brunswick, a normal number of twenty-one members, of whom seven only could be officers holding their posts at pleasure and conditionally on the vacating of seats in the instances alluded to in Lord Stanley's dispatch. Accordingly, in the new commission to Earl Cathcart as Governor of Nova Scotia, provision was made for increasing the number of members from fifteen to twenty-one; the royal instructions were not altered to restrict the number of councillors holding office, but the Lieutenant-Governor was required to observe the limitation to seven, and in addition the Lieutenant-Governor was to consider it his duty to suspend members of that Council on the occurrence of any of the disqualifications mentioned in the dispatch.

The conditions laid down appear more clearly in the case of New Brunswick, in which the matter was carried out primarily by dispatches only and without any alteration in the royal commission and instructions. In that case the number of members was increased to twenty-one merely by the issue of fresh warrants, and the restriction of the number of members holding office to seven was laid down by the dispatch, while the Lieutenant-Governor was told that if he suspended persons in accordance with the principles enunciated the suspensions would be confirmed by the Crown. Indeed, in a further dispatch of August 23, 1844, the Secretary of State for the Colonies declined to make a formal rule that members should hold during life.

In none of the royal commissions or instructions issued

down to the date on which Nova Scotia entered the Union was there any provision that councillors should hold for life; on the contrary, it was expressly provided that all members shall hold their places in the said Council during pleasure, provided always that the total number of the Council for the time being resident in the province should not at any time, by provisional appointments by the Governor, which was a normal way of making appointments, be raised to a greater number than twenty-one. Full power was given to the Governor to remove or suspend any officers, but no conditions of removal or suspension were specified, and a special provision was made that councillors absenting themselves above the space of six months without leave from the Lieutenant-Governor, or a year without leave from the Crown, should cease to be members. In 1883 the Legislative Council of Nova Scotia had to consider the position of a member who had become a bankrupt. A committee investigated the facts and reported in favour, if possible, of the removal of the member in question. Counsel were asked to advise, and they held that all appointments were during pleasure and that officers could be dismissed by the Lieutenant-Governor. Mr. Macdonald resigned in consequence of Lieutenant-Governor Archibald calling his attention to the matter in accordance with the precedent set in 1861, when Lord Stanley authorized Lord Falkland to call upon a certain member of the Council to resign on the ground of bankruptcy.

It is clear that previous to 1867 the Legislative Council was not, as has been repeatedly stated, really limited in number to twenty-one. It was precisely in the same position as the Legislative Council of Newfoundland; that is to say, the Crown could add as many members as it desired, but the Governor could not, so that any swamping would require the sanction of the Crown and its direct action by the appointment of fresh members by warrants. Moreover, it is perfectly clear, though Bourinot suggests otherwise, that the members held technically during pleasure, though equally it was obviously the intention that they should not

be removed save in the cases specified in the dispatch of 1845. The effect on the Council of the entry into the Union is somewhat curious. The power of the Crown to add to the number of councillors must be deemed to be gone, and therefore the number cannot exceed twenty-one, but the tenure during pleasure still prevails.[1] Of course it could be altered by Provincial Act under s. 92 (1) of the *British North America Act*, 1867, but the Legislature has only provided that the appointment of members shall be vested in the Lieutenant-Governor, who shall make such appointments in the King's name by instrument under the Great Seal of the Province, a provision made in 1872, and a further provision in the *Revised Statutes*, 1900, c. 2, lays down that any member of the Legislative Council who shall be absent from his place therein for two consecutive sessions shall vacate his post, these clauses being in effect re-enactments suited to the altered circumstances of the provisions in the royal commission and instructions before federation.

The question of the power of the Lieutenant-Governor with regard to the Legislative Council came to a head in 1879, when the Council rejected a measure passed by the Assembly for the abolition of the Upper House, and the Assembly subsequently passed an address to the Queen praying that the Imperial Parliament might pass an Act empowering the Lieutenant-Governor to increase the number of Legislative Councillors so that the measure in question might be passed. The Secretary of State for the Colonies, in refusing the prayer of the address, called special attention to the power of the Provincial Legislature under the *British North America Act* to amend the constitution of the province, and the circumstances as placed before him did not lead to the conclusion that an alteration of the Constitution had been proved to be necessary. Similarly, in a later dispatch of December 3, 1894, Lord Ripon laid it down that Her Majesty's Government considered that as the

[1] In New Brunswick the matter was regulated in 1868 by Act (p. 592, n. 1), but not in Nova Scotia until 1872 (c. 13), when the appointment was given to the Lieutenant-Governor in Council.

province had the power to alter its constitution, if it saw fit to do so, a resort to Imperial legislation would be inexpedient except in circumstances of urgent necessity.[1]

The Legislative Council continues to exist, with functions co-ordinate with those of the Assembly except as respects Bills of revenue, expenditure, and taxation, which it cannot initiate or amend, though it might reject them, and did so up to 1891. It cannot be swamped, and therefore it cannot, for the present at least, be abolished. It has, indeed, been suggested that the Lieutenant-Governor could use the power to remove legislative councillors on the ground that they hold during pleasure; thus he could either alter its composition so as to secure the passing of a measure for its abolition, or he could *de facto* abolish the Council by dismissing all the members. The latter theory must be certainly held to be *ultra vires* and illegal—the Lieutenant-Governor has the power to remove councillors but not to abolish the Council. It is more difficult to say that the former theory is, strictly speaking, illegal. It is the view of Bourinot that the power of the Lieutenant-Governor to remove councillors is confined to those cases laid down in the dispatch of 1845, but that view cannot be accepted as being legally, though it is no doubt constitutionally, correct. The Crown in 1845 eventually felt that it would be unwise to grant formally a life tenure subject only to vacating the post on certain definite conditions. The Imperial Government then left the matter at a tenure during pleasure, with instructions which in effect said that the members were to be allowed to hold office during life unless certain circumstances arose. But it is clear that with the disappearance of the power of the Crown as exercised directly through the

[1] See also *House of Assembly Journals*, 1894, App. No. 17. The Government in 1890, after an attempt to abolish the Upper House failed—the Upper House having offended by rejecting certain money votes—only appointed members on pledges that they would consent to abolition. But these gentlemen, while accepting all other Government measures, refused to keep their pledges on this point. In New Brunswick the abolition of the Upper House was effected by the councillors keeping similar pledges; see Hannay, ii. 345 seq.

Secretary of State the matter must rest on the terms of the royal commission, which was, as Bourinot fails to recognize,[1] an instrument under the Great Seal, and therefore of superior validity to a dispatch, especially when it is perfectly clear that it was the intention of the Imperial Government to provide by a formal instruction for a tenure during pleasure which would practically, under informal instructions, be a tenure for life. On the other hand, while it is most clear that the Lieutenant-Governor could dismiss every member of his Council and by new appointments call into being a Council which would support the views of the Lower House, such an act would be gravely unconstitutional, and should not be adopted save in the last resort.

New Brunswick, which had two Chambers, retained the nominee Upper Chamber for a time, but it was felt that no useful purpose was served after Federation in maintaining two Chambers, and eventually the Upper House was induced to allow itself to be extinguished. An Act (c. 9) was passed in 1891 abolishing the Legislative Council from the end of the then Parliament, and the Council came to an end with the dissolution of 1892.

In the case of Prince Edward Island the second Chamber also has disappeared, having been abolished by local Act (c. 21) of 1893.[2]

In the case of Manitoba a bicameral legislature—the Upper Chamber limited in number but nominee[3]—was created by the Dominion Statute (33 Vict. c. 3) which created the province, but it was definitely pronounced against by the new Premier, Mr. Girard, in 1874; Bills to

[1] Governors are not now appointed by instruments under the Great Seal, but that is because there is permanent provision for the office of Governor by permanent letters patent.

[2] From 1862 (c. 18) the Upper House was elective, and hence the Act of 1893 (now 1908, c. 1) does not abolish the distinction entirely, but causes part of the members of the one Assembly to be elected on a small property franchise, while the rest are elected on a manhood suffrage.

[3] It was first to have seven, and after four years not exceeding twelve members; see *Provincial Legislation*, 1867–95, pp. 806 seq.

abolish it passed the Lower House in 1874 and 1875, and it was abolished by a Provincial Act in 1876.

In the case of British Columbia, in 1856 two Chambers were created in Vancouver Island in virtue of the Governor's commission; these disappeared, however, on the union of the island with British Columbia, which had itself, under the Act 21 & 22 Vict. c. 99, a single Chamber partly elective. For the united Colonies a single Chamber was created in 1866 under the Act 29 & 30 Vict. c. 67. This was replaced in 1871, in virtue of an Act, No. 147 of 1871, passed by the Council as reconstituted by Order in Council of August 9, 1870 under the Act 33 & 34 Vict. c. 66, by a constitution the same as that of Ontario, which by the *British North America Act*, 1867, was created with a single Chamber only. The later provinces of Alberta and Saskatchewan, created in 1905 by Acts of the Canadian Parliament, 4 & 5 Edw. VII. cc. 3 and 42, have also single Chambers only.

In the case of Newfoundland the nominee Legislature has never effectually opposed the Lower House. Its numbers are unlimited, but beyond the number of fifteen appointments must, under the letters patent of 1876, be made by the King and not by the Governor. This legal difference does not, however, correspond with any difference in the constitutional position;[1] the Upper House is not entitled to oppose the will of the people, and it was added to at the request of Sir Robert Bond in 1904, in order to secure that there should be no resistance to the passing of the French Treaties Act of that year, and in 1909 at the request of Sir Edward Morris, to redress the balance in view of the fact that when he took government the House was mainly composed of nominees of the preceding Ministry, and difficulty in passing legislation was anticipated unless the House was strengthened. Under Sir Robert Bond's Ministry the Upper House rejected various measures (as, for

[1] The Governor could not add members against the advice of ministers, nor would the Crown do so; on the other hand, the Crown in Newfoundland having the responsibility of appointment, would doubtless refuse to make an unsuitable person a member.

example, the Bill to prevent the use of steamers on the Labrador Coasts in 1907 and 1908), but that action was taken with the consent of the Prime Minister's chief supporters, and cannot be regarded as having been an attempt to set the Lower House at defiance. In 1894 it was feared that it might throw out the Taxation Bill of that year, which had been carried through the Lower House by a minority government—several of the majority having been unseated for corrupt practices—but it did not actually do so. The contrast in this case, as in the case of the Upper Houses of the Maritime Provinces, between the Council before responsible government and after is most striking. Before responsible government the Councils habitually rejected legislation, and readily—as for years in New Brunswick—refused to pass appropriation and supply Bills, because they represented the Executive Government and not the popular will.

B. THE ELECTIVE UPPER HOUSES

§ 1. Victoria

Whatever may be the defects of Nominated Second Chambers, it is difficult not to feel that their demerits are small and unimportant compared with the demerits of Elective Second Chambers.

No better example of the defects which arise from creating two bodies, each with a claim to represent the opinion of the people, can be given than by examining the history of the two Houses of the Parliament of Victoria. The two Houses there have always been elective, and from the first it has been found impossible to induce harmonious working. Moreover, the Upper House has, simply and solely from the nature of the case, being elected on a higher franchise than the Lower, and the members being required to have a property franchise, been representative of wealth, and is therefore accused—a charge which it is difficult to deny—of devoting its main efforts to considering the interests of the wealthier classes, more especially the land-owners of the Colony.

This characteristic appeared in the earliest cases of serious dispute between the two Houses, which took

place in 1865.[1] It was then proposed by the Ministry of the day to pass a Protectionist Tariff, and as the Ministers knew that the Upper House, in the agricultural interests, would not be willing to accept it, they attempted to produce the result by tacking this provision to the Appropriation Bill of the year, adding also the repeal of the gold tax. It was argued in favour of their action that it was not a real case of tacking, as the matters were not substantially distinct, but it would be difficult to maintain this view in the ordinary sense of the word 'tacking'. The Council laid the Bill aside on July 25, and a deadlock ensued. The Prime Minister then introduced into the Lower House a resolution which asserted practically the same powers for the Lower House as had been asserted in 1861 by the Imperial House of Commons. The Governor was induced to consent to raising revenue on a resolution of the Assembly alone, it being argued that this was conformable to the practice in force in the United Kingdom, where the House passes a resolution as soon as the Chancellor of the Exchequer delivers his Budget speech, on the strength of which the revenue is collected. Petitions were filed by merchants in the Supreme Court, and the judges decided that the demanding of duties under the mere resolution of the Legislative Assembly was illegal.[2] The London Chartered Bank of Australia, whose only resident director was the Prime Minister, agreed to make advances upon no other security than the pledge of the Government for the repayment of the amount advanced, so that the dispute between the Council and the Assembly could be arranged. Then the London Chartered Bank brought an action for the money due; the Attorney-General confessed judgement, so the case did not come before Court, but the money was paid.

[1] See *Parl. Pap.*, March, May 28, June 1866; H. C. 310, 1867; H. C. 157, April and June 1868; C. 2173, pp. 103–13; Rusden, *Australia*, iii. 286 seq.

[2] *Stevenson* v. *The Queen*, (1865) 2 W. W. and A'B. L. 143. Cf. Lefroy, *Legislative Power in Canada*, p. 747, note 1. The case in England in 1909–10 was analogous, but the claim to levy was not made of right and the levying was therefore voluntary, and was legalized by the Act of 1910.

For these culpable acts the Governor was severely censured by the Secretary of State in a dispatch of November 27, 1865.[1]

In November the Assembly changed its tactics, and sent up to the Council a Tariff Bill apart from the Appropriation Bill, which was defeated by nineteen votes to five; the ministers then advised the Governor to grant a dissolution, and a general election was held early in 1866. The session was short; it met on February 12 and ended on April 5. The Ministry counted fifty-eight votes in a House of seventy-eight, yet on March 13 the Upper House rejected the tariff again, and the Ministry resigned. Mr. Fellows, the leader of the Opposition, was unable to form a Government, and Mr. McCulloch was asked to remain in office. Parliament was prorogued in order to permit of the reintroduction of the Bill on April 10, and summoned to meet on the 11th. In the new session a conference was held between the two Houses, which resulted in concessions on both sides. The Legislative Council won on matters of form, for the preamble was altered and the duration of the measure was extended, while on their part the Council did not insist on the objections which they had raised to the inclusion in a Bill of Supply of the repeal of the Gold Export Duty, accepting the assurance of the Committee of the Lower House that it was inserted in the Bill as a tax, and not as territorial revenue. A new Bill was passed, an Appropriation Act legalizing expenditure during 1864–6 became law, and the matter seemed to have ended, but for the recall of Sir Charles Darling by the Imperial Government. Sir Charles Darling had acted illegally and unwisely, but his recall was the source of much trouble and confusion. He had written a very foolish dispatch on December 23, 1865[2] to the Secretary of State relating to a petition which had been addressed to him by twenty-two ex-members of the Cabinet, who were still of course, as is usual in Victoria, members of the Executive Council. His dispatch, among other things, said, 'It is at least to be hoped that the future course of political events may never designate any of them for the

[1] See above, pp. 259 seq.

[2] *Parl. Pap.*, March 1866, pp. 77 seq.

position of a confidential adviser of the Crown, since it is impossible that their advice could be received with any other feelings than those of doubt and distrust.' Mr. Cardwell justly felt that to leave the Governor in office after that dispatch was impossible.

It was believed in the Colony that his recall was due to his support of the Legislative Assembly, who thanked Sir Charles Darling for his services and decided to grant £20,000 to Lady Darling for her separate use. Sir Charles Darling proceeded home, and made efforts to secure a reversal of the decision of the Secretary of State. In 1867 he intimated that Lady Darling would be willing to accept the grant. On the other hand, the new Governor was informed by the Secretary of State, in a dispatch which was laid before the Assembly on February 19, 1867, that the grant could not be sanctioned unless Sir Charles Darling was finally relinquishing the public service.[1] In April Sir Charles Darling relinquished the public service,[2] and the Governor submitted a measure to the Legislative Assembly on July 23, 1867, proposing the grant.

In 1868 Sir Roundell Palmer proposed in the House of Commons that the Governor's conduct should be condemned, but it was clear that the Governor was right in his action, as he was not entitled, by refusing a formal recommendation, to thwart the will of the House of Assembly. The grant was tacked on to the Appropriation Bill, and the Appropriation Bill was rejected by the Upper House on August 20, 1867, by twenty-three votes to six, with the result that a deadlock ensued which lasted thirty-two days. The ministers advised that there should be a prorogation as in 1866, and that the House should then be called together again for the reintroduction of the Bill. The Governor declined and the ministers resigned; the Governor being unable to find others had to reinstate them, proroguing Parliament on September 10 and calling it together on September 18. In the new session the Appropriation Bill, with the grant included, was passed by the Assembly and

[1] See *Parl. Pap.*, H. C. 310, 1867, pp. 37, 38. [2] Ibid., p. 54.

again on October 16 rejected by the Council. Ministers this time advised a dissolution, and the House was prorogued on November 8 and dissolved on December 30. The general election followed in February 1868. During the period of the deadlock the system of confessing judgement for salaries and paying them without further authority continued, but in December this plan was upset by the decision of the Supreme Court in the case of *Alcock* v. *Fergie*.[1] It was arranged in that case by the barristers, who wished to embarrass the Government, that indirectly the matter should be brought before the Court, which decided that the recovering of a judgement against the Crown did not authorize the payment of the amounts of such a judgement unless Parliament had previously voted the necessary funds.

The general election increased the majority of the ministers by making their numbers up to sixty, but Mr. Fellows resigned his seat in the Council and was elected to the Assembly. Meanwhile, however, Lord Carnarvon had succeeded the Duke of Buckingham as Colonial Secretary. On January 1 he sent a dispatch[2] in which he told the Governor that he ought not again to recommend the vote for the expenditure to the Legislature unless on a clear understanding that it would be brought before the Legislative Council in a manner which would enable them to exercise their discretion respecting it without the necessity of throwing the Colony into confusion. In a later dispatch[3] of February 1, on the other hand, he said that the proposed grant was not so clear and unmistakable a violation of the existing rule as to call for the extreme measure of forbidding the Governor to be party, under the advice of his responsible ministers, to those formal acts which were necessary to bring the grant under the consideration of the Parliament, and he then went on to suggest that the Council should no longer continue to oppose itself to the ascertained wishes of the community. On the receipt of the first of these

[1] See *Parl. Pap.*, H. C. 157, 1868, pp. 41 seq. [2] Ibid., p. 49.

[3] Ibid., p. 50. The inconsistency is really rather marked, and it is curious that the later dispatch ignores the earlier.

dispatches, ministers resigned and the Governor tried to fill their places; when the time came to meet Parliament the difficulties of the position were obvious. Ministers who were merely holding office pending the appointment of their successors could hardly prepare a speech. Accordingly for two months, whenever the House met, there was merely a motion for adjournment, Mr. Higinbotham acting as leader in the House in the illness of Mr. McCulloch. At length, on May 6, a Ministry was formed under Mr. Sladen, who accepted office only in order that Her Majesty's Government might be carried on, but two of the seven ministers were defeated on trying to obtain re-election. Mr. Fellows served in May as Minister of Justice and leader in the Assembly. During June Mr. Fellows offered to introduce the Darling grant as a separate Bill, and it appears that the Upper House would have accepted it in that form, when the news came that Sir Charles Darling had re-entered the public service.[1] It seemed that Sir Charles Darling had not understood that it was open to him to remain in that service, and though he did not receive a further appointment a pension of £1,000, dated from October 24, 1866, was given. He died in January 1870 at Cheltenham, and immediately on the news of his death being received both Houses passed a Bill conferring a pension of £1,000 a year on Lady Darling, together with a sum of £5,000 for the education of her children.

Mr. Higinbotham was deeply disappointed at the result, for his heart was in the defeat of the Upper Chamber, which he was not destined to see accomplished in his lifetime. His indignation vented itself in his famous speech in 1869[2] protesting against Imperial interference in the affairs of the Colony, and in the resolution against that interference which he carried in that year. But he was unable to secure any substantial renewal of the attack on the Upper House, and ultimately he abandoned politics for the judicial bench, to emerge nearly twenty years later in disputes with the Colonial Office.

In 1877 the dispute between the two Houses of Victoria

[1] *Parl. Pap.*, June 1868, pp. 8 seq.

[2] See Morris, *Memoirs of George Higinbotham*, pp. 160–89.

came very violently to the front. The Governor, Sir George Bowen, reported in a telegram of the 19th of September[1] that his ministers proposed to place on the estimates the payment of members, as in Newfoundland and Canada. The Governor desired to know whether he was prohibited by the dispatch from the Secretary of State of the 1st of January, 1868,[2] from consenting to this proposal; if he were prohibited a collision between the Imperial Government and the House of Assembly was probably inevitable. In replying on September 27, Lord Carnarvon authorized the Governor to follow the advice of his ministers. In a dispatch of September 19[3] the Governor explained the situation at greater length: payment of members had been in force since 1871 under temporary Acts, and his Government proposed to regard the principle as the established law and to place a sum on the annual estimates to provide for the expenses of members. The Governor was of opinion that he should consent to this course, and he thought that a clear distinction could be drawn between the case in question and the proposed grant to Lady Darling, which formed the subject of the dispatch of January 1, 1868. The publication of that dispatch had caused the resignation of the then Prime Minister, Sir James McCulloch and his colleagues, on the ground that the Secretary of State had attempted an unconstitutional interference with the principle of self-government as conceded to Victoria by the Queen and the Imperial Parliament. An address had been carried to the Assembly on the 4th of June 1868, in which the Governor had been informed that the dispatch suggesting that the vote to Lady Darling should not be recommended, except on the clear understanding that the grant would be brought before the Legislative Council in a particular form, was a violation of the constitutional rights of the Legislative Assembly and a dangerous infringement of the fundamental principles of the system of responsible government. Lord Canterbury had been unable to form

[1] *Parl. Pap.*, C. 1982, p. 1. [2] *Parl. Pap.*, H. C. 157, 1868, p. 49.
[3] *Parl. Pap.*, C. 1982, p. 1; Rusden, *Australia*, iii. 413 seq.

a coalition government and he had been compelled to reinstate Sir James McCulloch and his colleagues in office, and the difficulty was only terminated by the arrangement under which Sir Charles Darling, on the prospect of further employment under the Crown, relinquished his claim to the proposed grant. It was clear that the feeling of the House was very strong. He himself was prepared to undertake the responsibility in a matter which appeared to him of Colonial interest only, but in view of the dispatch from the Secretary of State of January 1, 1868, he felt bound to refer home for instructions.

In a reply of December 20, 1877,[1] Lord Carnarvon stated that the payment of the members of Parliament was a matter with which the Parliament and Government of Victoria alone had to deal, for it involved no question calling for the intervention of the Imperial Government on which it seemed to him incumbent on him to express an opinion.

Under the circumstances, on further discussion with his ministers, the Governor consented to recommend, as was necessary under the *Constitution Act*, the formal inclusion of the item in the Colonial Estimates.

On November 28, 1877,[2] the Governor reported that the question of privilege had arisen between the two Houses on the question of a Bill for appropriating £38,000 for the erection of certain defence works recommended for the Colony by Sir William Jervois, on the ground that the preamble intringed the privileges of the Upper House. He pointed out that the preamble was adopted, with the necessary changes, from certain Imperial Acts to which no exception had been taken by the House of Lords. The two Houses, however, continued to wrangle, and the Legislative Council insisted that they had powers other than those of the House of Lords. Then the Legislative Council proceeded to reject the Appropriation Bill, which contained the provision for the payment of members. The ministers then advised the Governor to make, and he made, large temporary reductions in the public expenditure, dispensing

[1] *Parl. Pap.*, C. 1982, p. 14. [2] Ibid., p. 24.

for the time being with the services of a number of civil servants and minor judicial officers. The Governor reported [1] on the question on January 23, 1878, supporting the views of the House of Assembly, and alluded to the difficulty of dealing with the Council in view of its powers over finance and the absence of power to appoint further members, as was possible in the case of nominee Councils.

On December 31, 1877, the Governor transmitted a memorandum by Mr. Graham Berry on the subject of the difficulties which had arisen.[2] He pointed out the great inconvenience of the rejection of the Appropriation Bill and of the Defence Bill; supply would be exhausted early in March, when the local forces, the police, the jails, and the public service could no longer be paid or maintained, unless the Governor would sign warrants for the expenditure although Parliament had not voted the money. Moreover, there was the possibility of foreign aggression, and the Colony would be rendered defenceless by the failure of supply. It was therefore urged upon the Governor that it had been the practice prior to 1862 to apply public money to the services of the year on the report of the Committee of Supply to the Assembly, without waiting for any other authority. Former Governors habitually signed warrants for the issue of public money, although the Council had not sanctioned the expenditure. By reverting to the former practice (which had been changed by adopting in 1862 the sending to the Council of Supply Bills though they still contained a clause appropriating the amount so voted to purposes to be determined by the Legislative Assembly in the then session of Parliament), the difficulty of supply could be constitutionally avoided. The Solicitor-General of Victoria in 1858 was of opinion that the moneys could be legally issued from the Treasury, on the ground of custom and precedent, on the resolution of the Assembly, and thought that this was also the practice of the House of Commons, and this opinion was concurred in by the then Attorney-General and the law officers of the Colony in 1865 and 1877.

[1] *Parl. Pap.*, C. 1982, pp. 31, 43 seq. [2] Ibid., pp. 38 seq.

Sir Michael Hicks-Beach, in a telegram of the 22nd of February 1878,[1] told the Governor that his duty was clearly to act in accordance with the advice of his ministers, provided he was satisfied that the action advised was lawful; if not so satisfied, he should take his stand on the law; if doubtful as to the law, he should have recourse to the legal advice at his command. In a dispatch of the 23rd of January 1878,[2] Sir G. Bowen reported the grounds on which he had consented to terminate the services of certain officers of the Civil Service. Sufficient officers had been retained to provide for the administration of the country, all the steps taken were legal, and none of the unconstitutional contrivances adopted in the previous crisis and condemned by the Secretary of State for the Colonies at the time, had been sanctioned by the Governor. He had made it clear that he would not allow any interference with the currency or the banking institutions of the country.

On the 25th of January, 1878,[3] the Governor sent the opinion of the Attorney-General of Victoria, which stated that he concurred in the opinion of the Solicitor-General in 1858 that the resolutions of the Committee of Supply of the Lower House, when reported to, and adopted by, the House, made the amount legally available, and enclosed correspondence in 1857–66 with regard to Money Bills in Victoria.

On the 26th of January [4] the Governor reported that he had found it necessary to call the attention of his ministers to the question of the legality of certain of their acts; it had been asserted on the 8th of January by his ministers that the action taken in terminating the services of certain judicial officers had been legal, but that assertion had been erroneous, and he had therefore insisted on the cancellation of the removal of these officers. On the other hand, representations were made by the Legislative Council of Victoria pointing out that the Governor had acted as a partisan in

[1] *Parl. Pap.*, C. 1982, p. 41. [2] Ibid., p. 43.

[3] *Parl. Pap.*, C. 1985, p. 5.

[4] Ibid., p. 32. He did not add that many of the reinstated officers were simultaneously, but in due form, removed again from office.

supporting the Lower House against the Upper House, an accusation which the Governor energetically denied.

The Governor, in a dispatch of the 26th of January,[1] criticized adversely the claims of the Legislative Council, and their argument that the duty of the Ministry when the Bill was rejected was to acquiesce in the Council's decision or resign or advise a dissolution. There was no reason to suppose that a dissolution would result in any change in the composition of the Assembly. The House was only eight months old, and if the claims of the Council were allowed the majority of the Council would become practically absolute rulers in the community, for they would have the power, simply by throwing out the Appropriation Bill, to make and unmake Ministries, and to subject the representatives of the people in the Assembly to an intolerable series of dissolutions. He also protested against the Legislative Council imputing to him personal responsibility for acts done on the advice of his Executive Council. In a dispatch, also of January 26,[2] he called attention to the fact that the Government had a right to dispense at pleasure with the services of any officers, as shown by the decision of the Supreme Court of Victoria in 1859 in the case of *Furnival* v. *The Queen*.

On the 4th of February, 1878,[3] the Governor sent a dispatch in which he stated that a case had been brought unsuccessfully before the Supreme Court to test the legality of the action of the Ministry respecting the County Court Judges, it having been alleged that a certain case tried before a judge had been improperly tried, as the judge had been dismissed from office and not properly reinstated. In subsequent dispatches he pointed out that Mr. Berry commanded nearly sixty votes in a House of eighty-six members, and there was every reason to believe that he retained an equal majority in the constituencies.

Both Houses of Parliament presented addresses to the Crown maintaining their own rights and defending their

[1] *Parl. Pap.*, C. 1985, p. 42. [2] Ibid., p. 45.
[3] *Parl. Pap.*, C. 2173, p. 1. Cf. Turner, *History of Victoria*, ii. 200 seq.

action, and petitions were sent home and presented by deputation to the Secretary of State.[1]

On April 9, however, the Governor telegraphed that Parliament had been prorogued, that the Appropriation and other Bills had been passed, that the political excitement was subsiding and that the Colony was tranquil; the deputation to Sir Michael Hicks-Beach was therefore dismissed with vague assurances. The petitions also received no definite answer, on the ground that the difficulties had been disposed of by agreement.[2]

On March 17, 1878,[3] the Governor reported that he had consented to sign a warrant prepared in accordance with the resolution of the Legislative Assembly, and authorized by the forty-fifth section of the Constitution Statute, whereby the costs and expenses of the collection of revenue were constituted a special appropriation. The Governor had consented to sign it on the written opinion of the law officers of the Crown and a certificate from the Commissioners of Audit. Moreover, the sum was necessary to keep the Government going, and it was only to be used if the Upper House declined to pass the appropriation. His ministers, however, were not prepared to refer the question of its legality to any tribunal whatever, and they were dissatisfied with the action of the Governor in sending home the question with a request for the advice of the law officers of the Crown in England.[4] The questions at issue were being adjusted by a compromise, and the Appropriation Bill was passed and Parliament prorogued. The Governor sent home long dispatches on the 11th and 12th of April 1878,[5] in which he defended his action and explained the steps he had taken to secure the settlement of the deadlock. It was of vital importance, in his opinion, to avoid the removal of a Ministry by a Governor's own individual act on account of proceedings of purely Colonial concern. He justified his action by the precedents of Lord Elgin in Canada from 1848 to 1851, and of Lord Dufferin in the same

[1] *Parl. Pap.*, C. 2173, p. 22. [2] Ibid., p. 30. [3] Ibid., p. 32.
[4] Ibid. pp. 50, 51. [5] Ibid., pp. 54 seq., 63 seq.

Dominion in 1873, when his conduct was approved by Lord Kimberley in a dispatch of November 28, 1873.

On the passing of the Appropriation Bill the Governor reminded the ministers of the position of those officers whose services had been dispensed with in January in order to economize funds.[1] He suggested that they should treat them liberally, and as a matter of fact some of the officers were replaced. He took occasion to justify the position adopted by the ministers in dismissing these officers, and he also explained that, though they had not reinstated all the officers, still their conduct could be justified by all the principles of responsible government, and therefore he thought that it was in order and that he was right in acquiescing in it.

On July 5, 1878,[2] the Secretary of State for the Colonies replied to the Governor's dispatch of the 23rd of March[3] on the subject of the obligation of the Governor, in the opinion of the ministers, to accept the view of law expressed by the local law officers.

The following paragraphs express the view of the Secretary of State :—

4. In my telegram of the 22nd of February[4] I informed you that your duty in the circumstances then described to me was clear, namely, to act in accordance with the advice of your ministers, provided that you were satisfied that the action advised was lawful; that if not so satisfied you should take your stand on the law, and that if in doubt as to the law you should have recourse to the legal advice at your command.

5. I thus recognized on the one hand the general obligation of a Governor to follow the advice of his ministers in local matters, and on the other hand the necessity of special care on his part, as the representative of the Crown, to avoid any illegal act, and the responsibility which, under particular circumstances, may be thrown upon him to determine whether an act is or is not illegal.

6. It is not to be presumed that the Colonial ministers will, in the absence of a pressing emergency, or even then without carefully setting forth their reasons and explanations,

[1] *Parl. Pap.*, C. 2173, p. 66.
[2] Ibid., p. 81.
[3] Ibid., pp. 49, 50.
[4] *Parl. Pap.*, C. 1982, p. 41.

advise a Governor to perform an act which they admit to be contrary to law, or not yet authorized by law. If, however, they think that there are grounds for tendering such advice they will do so under the obligation of obtaining, in so far as they are themselves concerned, the subsequent approval of Parliament, with an indemnity should the circumstances appear to require it.

7. But it is not possible in the same manner, or to the same extent, to cover by the *ex post facto* sanction of the local Parliament the action of a Governor who under ministerial advice has acted in a manner unauthorized by or contrary to the law. There are also cases in which the Governor has positive duties to perform which are prescribed by law, and which are not matters of policy or of opinion. The Constitution of Victoria specifies the Governor as the person by whom certain acts necessary for keeping in motion the administrative machinery of the country shall be done, and his responsibility in regard of such acts cannot entirely be borne by the ministers nor by the local Parliament. For anything which he may do or decline to do the Governor is accountable to the Sovereign whom he represents, and not directly to the community over which he is appointed to preside, and if Her Majesty's Government should require him to show that his acts have been lawful, or, if not in conformity with any law, have been necessary to meet a pressing emergency, this would afford no ground for saying that the responsibility of the Colonial ministers in local matters has been in any degree interfered with.

The ministers of Victoria also took exception to the publication of certain correspondence with the Secretary of State and to his receiving a deputation, but the Secretary of State declined to suppose that they could desire to fetter his discretion in the matter at all.[1]

In a dispatch of August 17, 1878,[2] the Secretary of State gave the opinion of the law officers of the Crown that, while the moneys necessary for defraying the costs of the collection of revenue in Victoria were specifically appropriated for the purpose by s. 45 of the *Constitution Act*, the view that, when the Committee of Supply had voted money for other purposes and the vote had been reported to the Legislative Assembly, the amount voted becomes

[1] *Parl. Pap.*, C. 2173, p. 97. [2] Ibid., pp. 97–9.

legally available, was mistaken, and the sum was not available until appropriation by an Act of the Legislature. He explained that the position in England was not as it had been supposed to be in Victoria, which he stated to be as follows :—

3. As, however, the ministerial Memorandum seems to proceed upon a misapprehension of what is the exact procedure of the House of Commons in England with respect to taxation and appropriation, it will be convenient that I should explain for your information what really is the system which prevails in this country. That system may briefly be stated as follows :—

The annual charges for the army and navy, for the collection of revenue, and for the civil service, are examined and discussed in Committee of the whole House on Supply, and the sanction of the House of Commons is embodied in resolutions of that Committee, which are reported to and confirmed by the House. These resolutions grant limited sums for services separately defined and for the limited period of one year.

4. But the resolutions, although they record the sanction of the House of Commons to the expenditure submitted to them, do not enable the Government to draw from the Consolidated Fund (to which the whole of the accruing income of the State is paid) the money requisite to meet such expenditure. A further authority is required in the shape of a resolution in Committee of the whole House on Ways and Means, which must be reported to and confirmed by the House and must be embodied in a Bill, to be passed through both Houses of Parliament before practical effect can be given to the votes in supply by authorizing the Treasury to take out of the Consolidated Fund the money required to defray the expenditure sanctioned by such votes. The votes in Committee of Supply authorize the expenditure, the votes in Committee of Ways and Means provide the funds to meet that expenditure.

5. The manner in which this provision is made is as follows :—

Early in the session votes are taken for the pay, &c., of the naval and military forces, and a resolution is passed in Committee of Ways and Means for a general grant out of the Consolidated Fund towards making good the supply granted to Her Majesty. This resolution is reported to and confirmed by the House, and upon it a Bill is founded,

which passes through its various stages, and finally receives the royal assent; and then, but not before, the Treasury are empowered to direct an issue out of the Consolidated Fund to meet the payments authorized by votes in supply of the House of Commons. This general grant of ways and means is made available, so far as it will go, to meet votes in supply passed both before and after it.

6. The constitutional effect of these regulations is that until the House of Lords and the Crown have assented to the grant of ways and means, the appropriation of the public money directed by votes in supply of the House of Commons is inoperative. These general grants of ways and means on account during the session in anticipation of the specific appropriations embodied in the Appropriation Act passed at the close of the session, may be viewed as the form in which Parliament considers it most convenient to convey their sanction to an *ad interim* issue of public money upon the appropriation directed by the Commons alone, relying upon their final confirmation being obtained at the close of the session. For example, on the 4th and 15th March 1878, votes amounting to more than £12,100,000 were granted in supply for the army and navy services of 1878–9. On the 19th March a vote of £12,000,000 in ways and means was taken towards making good the supply granted to Her Majesty for 1878–9, and this vote was embodied in a Ways and Means Bill which received the royal assent on 28th March.

7. These ways and means have since been used not only for military and naval services, but to meet such votes as have been granted in supply for civil services and collection of the revenue since the passing of the ways and means resolution on 19th March.

8. I have thus, I think, sufficiently explained that, according to the practice followed in this country, a supply for some branch of the public service must have been granted to the Queen, and ways and means towards making good that supply must have been provided by an Act, before Her Majesty can authorize the Treasury to issue any money; but that so soon as ways and means have been provided for any service, the Treasury may draw upon these ways and means so long as they last, in order to defray the expense of any votes comprised in the resolutions adopted in supply (whether before or after the date of the resolution in ways and means), provided always that such resolutions in supply have been passed in the same session of Parliament. Finally,

the Appropriation Act, which is passed at the end of the session, specifically appropriates to the various services the sums granted in Committee of Supply, and by a covering grant of ways and means provides the money required to meet the whole of the supplies granted for the year.

In a further dispatch of August 25, 1878,[1] the Secretary of State expressed regret that it had not been found possible to arrange for a general reinstatement of the members of the Civil Service of the Colony. He could not agree that there was anything unconstitutional in the Governor's questioning the course taken with regard to these public officers; the removal of so many officers involved a constitutional question of great importance as a precedent in all self-governing Colonies, namely, the position of the permanent civil servants. There was no intention to carry out a scheme of reduction of the service, and the officers had been dismissed solely to economize the funds at the disposal of the Government. The Governor was obliged, in so grave a matter, to satisfy himself that the action proposed by his ministers was justifiable, and after making every allowance for the difficulties of his position the Secretary of State did not think that the emergency was of such a character as to justify the course which had been adopted.

In a dispatch of July 13, 1878,[2] the Governor communicated the message with which he had opened the second session of the ninth Parliament on the 9th of that month. In his speech, which was of course an expression of ministerial views, he said that it was proposed to lay before the Houses a measure of constitutional reform intended to put an end for all time to the recurrence of those periodical deadlocks which were so injurious to trade and commerce, and a standing disgrace to the constitutional institutions of Victoria. He remarked that unfortunately the attempt to embody in comparatively rigid law the elasticity inherent in the principles and practice of the British Constitution had not been completely successful, and differences in the interpretation of the *Constitution Act* had resulted in bringing

[1] *Parl. Pap.*, C. 2173, p. 99.

[2] *Parl. Pap.*, C. 2217, p. 1.

the legislative machinery of the state to a temporary standstill on no less than four different occasions.

In reporting further on August 5, 1878,[1] the Governor mentioned that in 1874 Mr. Francis's Ministry introduced a Bill to provide that if a measure were passed by the Legislative Assembly in two consecutive ordinary sessions, and shall fail to pass through the next Legislative Council, the Governor might prorogue Parliament, and within sixty and after not less than thirty days convene a meeting of both Houses to deal with the measure, and such measure could then be passed with or without amendments by an absolute majority of the members of both Houses. It had been the original intention of his ministers to propose the substitution in Victoria of a nominee Council on the plan which had worked well in New South Wales, New Zealand, and Queensland, but this was not popular in the country and had been abandoned.

The Bill which was introduced by the Government proposed, in the case of money and tax Bills, that if a money Bill or tax Bill was not passed within a month by the Council it should be deemed to be passed, and that the fifty-sixth section of the Constitution should be amended by omitting the power there given to the Legislative Council to reject a money Bill. A definition was proposed of Bills to which the fifty-sixth section should relate, to include every Annual Appropriation Bill and every Ways and Means Bill, and any Bill of which the primary object should be the appropriating of any part of the revenue of Victoria or the imposing of any duty, rate, tax, rent, return, or impost. Nevertheless, the Legislative Council could, within the month, make suggestions which the Assembly could accept if it desired. In the case of all other Bills which should be passed by the Assembly in two consecutive annual sessions, and rejected in each by the Legislative Council, it should become law, unless indeed the Bill should be rejected at a general poll of the electors for the Assembly. No Bills should be sub-

[1] *Parl. Pap.*, C. 2217, p. 4; Rusden, *Australia*, iii. 386 seq. The Bill did not obtain an absolute majority in the Assembly. Cf. 1 & 2 Geo. V. c. 13, s. 1.

mitted to a general poll unless, within twenty-one days of the second rejection, an address was presented to the Governor by the Legislative Council asking for the submission of the Bills, provided always that the resolution for the address should have been passed with the concurrence of an absolute majority of the whole number of the Council. Provision was made in the Bill for taking the poll, and if the majority was in favour of the Bill it would then become law. The ministers urged in favour of the Bill that it would end difficulties, and they said that they were going to send home commissioners of the Assembly if the Legislative Council would not accept their proposals, in order, if possible, to obtain an Imperial Act. They recognized that it was a strong measure, and they thought that this was a case in which strong measures were essential.

In his reply of October 1, 1878,[1] the Secretary of State intimated that, so far as matters had gone, and with no very definite proof of public feeling in support of the measure, it would be impossible to justify so strong a measure as an Imperial Act, but that if it were thought that it would be useful for members to come home and discuss with him he would be glad to do his best to attempt to conciliate.

The Bill passed the Assembly on the second reading by fifty-nine to twenty-two in a House of eighty-six members, and on the third by fifty to twenty-one.

Meanwhile, in a dispatch of the 3rd of October[2] the Governor reported that on the 25th of September the Supreme Court of Victoria had again decided, on a motion for a writ of *quo warranto*, that the action of his ministers in dismissing certain district judges was free from all illegality.

The Bill naturally was not accepted by the Legislative Council, and it was agreed to postpone the matter until the session of 1879. It was expected that the Appropriation Bill would be passed, and then in the Parliamentary recess members of both Houses would visit England to discuss the Constitution. Various proposals had been made by the Council for avoiding the deadlocks, but it was clear that there

[1] *Parl. Pap.*, C. 2217, p. 20.

[2] Ibid., p. 22.

was no real possibility of a settlement of the situation. The Council took an opportunity of pressing for the presence in the Council of two or, if possible, more ministers, so as to ensure the harmonious working of the Houses and tend to prevent the danger of collisions.

The departure of the delegation was postponed owing to further attempts to settle the matters by discussion, and when sent it consisted only of Mr. Berry, the Premier, and of Professor C. H. Pearson, a member of the Assembly.

The Governor, in a dispatch of November 22, 1878,[1] expressed much regret at the disapproval which had been conveyed to him in the Secretary of State's dispatch of August 25, 1878.[2] He argued at length that his action had been entirely in accordance with the principles of self-government. He had understood that he was expected to act on those principles, though of course, had he known that he was intended to resist the proposals of the Assembly he would readily have done so. The action he had taken had been entirely in accord with the instructions which he had received as Governor of Queensland from the Duke of Newcastle, which he quoted as follows :—

> The general principle by which the Governor of a Colony possessing responsible government is to be guided is this : that when Imperial interests are concerned, he is to consider himself the guardian of those interests ; but in matters of purely local politics he is bound, except in extreme cases, to follow the advice of a Ministry which appears to possess the confidence of the Legislature. But extreme cases are those which cannot be reduced to any recognized principle, arising in circumstances which it is impossible or unwise to anticipate, and of which the full force can in general be estimated only by persons in immediate contact with them.

The Duke of Newcastle further defined the 'extreme cases' referred to by him as

> such extreme and exceptional circumstances as would warrant a military or naval officer in taking some critical step against or beyond his orders. Like such an officer, the Governor who took so unusual a course in the absence of

[1] *Parl. Pap.*, C. 2217, p. 42.

[2] Ibid., C. 2173, p. 99.

instructions from home would not be necessarily wrong, but he would necessarily act at his own peril. If the question were one in which Imperial interests were concerned, it would be for the Home Government to consider whether his exceptional measure had been right and prudent. If the question were one in which Colonial interests were alone or principally concerned, he would also make himself in a certain sense responsible to the Colonists, who might justify the course he had taken, and even prove their gratitude to him for having taken it, by supporting him against the ministers whose advice he had rejected, but who on the other hand, if they perseveringly supported those ministers, might ultimately succeed in making it impossible for him to carry on the government, and thus, perhaps, necessitate his recall.

The Duke of Newcastle added these very significant remarks :—

In granting responsible government to the larger Colonies of Great Britain, the Imperial Government were fully aware that the power they granted must occasionally be used amiss, but they have always trusted that the errors of a free government would cure themselves, and that the Colonists would be led to exert greater energy and circumspection in legislation and government when they were made to feel that they would not be rescued from the consequences of any imprudence merely affecting themselves by authoritative intervention of the Crown or of the Governor.

It was absolutely impossible for him to form another Ministry in view of the strength of the governmental party, and he had carried out in practice the conviction expressed by Lord Elgin while Governor-General of Canada, of the supreme importance of keeping the Imperial Government, at whatever cost or risk to the Governor personally, aloof from and above the strife of Colonial parties. He did not pretend to approve all the measures of his Government, but his action had been in harmony with that of Lord Elgin in 1848–51,[1] and Lord Dufferin in 1873, and the action of the Crown in England in removing a Ministry in the confidence of the House of Commons in 1834 had been disapproved by an eminent writer.[2]

[1] Cf. Walrond, *Letters and Journals of Lord Elgin*, pp. 70 seq.

[2] See above, p. 223, n. 2, and cf. Maxwell, *Century of Empire*, ii. 37, 38.

The dispatch is an extremely able one, and is a justification of the conduct of the Governor which must be definitely considered as more than adequately meeting the objections raised to his conduct by the Secretary of State.

On the other hand, the Council sent home a long statement in which they criticized seriously the Governor's action, and declared that he had been guilty of illegal conduct. They said[1]:—

There are other circumstances in which a deviation from the spirit of English precedents has tended to place the Council at a disadvantage. Neither from the Governor, nor the advisers of the Governor, has the Council hitherto received proper consideration. This defect is probably a consequence of the aggressive tendencies of the Legislative Assembly; but these tendencies have been stimulated and not restrained by the action of the Executive. In England the Crown has not hesitated, when occasion required, to exert all its influence in order to restore and to maintain harmony between the two Houses; and it has invariably refused to lend its aid to either House to the detriment of the other. In this country a different practice has occasionally prevailed. Some Governors appear to have understood the principles of responsible government to mean that they were thereby deprived of all discretion, and were bound to permit the Ministry of the day not only to use the whole power of the prerogative, but to strain it, for the purpose of giving effect to the wishes of the Assembly against the Council.

The Assembly naturally retorted, and made savage attacks upon the action of the Upper House, which it accused[2] of having thrown out in twenty-two years more than eighty Bills, and of amending more than twenty others so that the Assembly preferred to drop them. It maintained state aid to religion for fifteen years in opposition to the expressed will of the country; it mutilated till they were useless six Bills for mining on private property; it seven times threw out Payment of Members; it rejected an Electoral Bill and a Tariff Bill passed by a large majority. It rejected four Appropriation Bills and a Temporary Supply Bill. It threw out a Bill to provide for the defence when invasion seemed imminent. It rejected a Bill for an International Exhibition

[1] *Parl. Pap.*, C. 2217, p. 55. [2] Ibid., p. 65.

on the plea that a Protectionist Colony had nothing to exhibit. Land Acts had been amended so as to favour the capitalist class. The last Land Act of 1878 had reduced to six from twenty years the period within which the original selectors of Crown land could alienate the land so selected.

The Assembly energetically supported the Governor, and claimed that he had acted in full accordance with the principles of popular government.

On December 27, 1878,[1] the Governor reported that the deputation was starting, but that the Legislative Council had declined to send a deputation. He added with pleasure that it showed a great change in the spirit of the Assembly that they should be willing to refer to the Imperial Government in contrast to the resolutions adopted in 1869 by Mr. Higinbotham, one of which had laid down:—

> That the official communication of advice, suggestions, or instructions by the Secretary of State for the Colonies to Her Majesty's Representative in Victoria on any subject whatsoever connected with the administration of the local Government, except the giving or withholding the royal assent to or the reservation of Bills passed by the two Houses of the Victorian Parliament, is a practice not sanctioned by law, derogatory to the independence of the Queen's Representative, and a violation both of the principles of the system of responsible government and of the constitutional rights of the people of this Colony.

He expressed his opinion that the Second Chamber in the Australian Colonies should be created by nomination rather than election.

A nominated Upper House, he thought, followed the practice of the House of Lords and adopted its precedents. Moreover, Lord Canterbury, the Governor's predecessor in the Government of Victoria, who was experienced in the Imperial Legislature and the Colonial administration alike, thought that the position and mutual relations of the Council and Assembly should be, for all practical purposes and so far as the circumstances of the case permitted, analogous to those of the House of Lords and of the House of Commons.

[1] *Parl. Pap.*, C. 2217, p. 73.

The Assembly had claimed no more than the privileges of the House of Commons, but the Council had gone far beyond that.

The Parliament of Canada had, after a long trial of an elective Upper House (from 1856 to 1867), returned to the system of nomination, which was a success in New Zealand, New South Wales, and Queensland. The system of nomination would really be the proper solution of the difficulties in Victoria, but if an elective House were insisted upon he suggested that if a Bill were passed by the Assembly in two consecutive ordinary sessions and were twice rejected by the Council, then either the two Houses should sit together and the decision of an absolute majority should be final, or both Houses should be liable under certain conditions to be dissolved.

On February 17, 1879[1] the Secretary of State replied, reviewing at large the arguments of the Governor in favour of his conduct. He still was of opinion that he should not have consented to the removal of the judicial and civil officials. Refusal to remove would not necessarily have involved the removal of the ministers or their resignation ; the ministers had been induced by him partially to retrace their steps, and he might have succeeded by pressure in securing that they should not adopt the proposal which they finally adopted.

In a dispatch of December 2, 1878,[2] the Governor sent to the Secretary of State a petition to the Queen from the late Chief Engineer of Water Supply, who had been dismissed from the service in the financial crisis. His ministers were prepared, as a result of pressure which he had brought to bear upon them, to offer to the officer one year's salary and allowance if he withdrew the petition, although he was entitled to only £582. It was the duty, in his opinion, of Mr. Gordon to bring his case before the local legislature, which could vote him further compensation and could censure ministers for their conduct towards him. His Government were satisfied that Mr. Gordon had no legal grounds for the

[1] *Parl. Pap.*, C. 2217, p. 75. [2] *Parl. Pap.*, C. 2339, p. 1.

claim which he put forward, while the offer made to him was sufficient to meet any claim arising from any misunderstanding regarding the permanency of his employment.

In replying on February 21, 1879,[1] the Secretary of State said that he had been unable to advise Her Majesty in respect to the prayer of Mr. Gordon's petition, it being one which lay within the jurisdiction of the Governor and Executive Council.

Mr. Berry, on arrival in England, addressed the Secretary of State on February 26, 1879[2] in a letter in which he criticized the Secretary of State's dispatch of October 1, 1878,[3] expressing his views that no cause had been shown for the intervention of the Imperial Parliament. He said that, in view of the position taken up by the Council, which would make no concession, Her Majesty's Government would no doubt be willing to interpose to solve the difficulties which were otherwise arising. He also made representations to the Secretary of State, who indicated his decision on the whole question on May 3, 1879,[4] to the Marquess of Normanby. In that dispatch he declined to propose Imperial legislation; he considered that there was no desire in the Colony to reduce the Council to a sham and give the Assembly a complete practical supremacy, uncontrolled even by the sense of sole responsibility which might exert a beneficial influence on the action of a single Chamber.

He pointed out that the difficulties had arisen with regard to finance, but this difficulty would not arise if the two Houses of Victoria were guided in this matter, as in others, by the practice of the Imperial Parliament, the Council following the practice of the House of Lords and the Assembly that of the House of Commons. The Assembly, like the House of Commons, would claim and in practice exercise the right of granting aids and supplies to the Crown, of limiting the matter, manner, measure, and time of such grants, and of so framing Bills of Supply that these rights

[1] *Parl. Pap.*, C. 2339, p. 13. Cf. Mr. Gaunt's case, C. 2173, pp. 78, 84.
[2] Ibid., p. 13.
[3] *Parl. Pap.*, C. 2217, p. 20.
[4] *Parl. Pap.*, C. 2339, p. 20. Cf. South Australia *Assembly Debates*, 1911, p. 193.

should be maintained inviolate; and as it would refrain from annexing to a Bill of Aid or Supply any clause or clauses of a nature foreign to or different from the matter of such a Bill, so the Council would refrain from any steps so injurious to the public service as the rejection of an Appropriation Bill. He considered that it would be advisable if the two Houses would arrange this by some mutual understanding, but it might be found necessary either to adopt a joint standing order, as was proposed in 1867, or to legislate. The former course would be more convenient, but even the clearest definition would not suffice to prevent collisions unless interpreted with that discretion and mutual forbearance which has been so often exemplified in the history of the Imperial Parliament.

He did not think that any proposals with regard to overcoming the deadlocks in ordinary legislation were satisfactory, and he hoped that the Council of Victoria would recognize its constitutional position and so transact its business that the wishes of the people, as clearly and repeatedly expressed, should ultimately prevail. But if both parties would not accept a solution, he considered Imperial intervention as only probable if the Council should refuse to concur with the Assembly in some reasonable proposal for regulating the future relations of the two Houses in financial matters, in accordance with the precedent of the Imperial Parliament, and should persist in such refusal after the proposals of the Assembly for that purpose had been ratified by the country on an appeal being made to the constituencies.

Mr. Berry then introduced a Bill to make the Upper House nominee with a provision for a referendum as to deadlocks in general legislation. But on the third reading the Bill failed to obtain an absolute majority in the Assembly, and the Ministry was defeated at the general election of February 1880. It regained office at the election of July, and in 1881 the franchise was lowered, the property qualification reduced, the number of members increased to 42, and the period of service of Councillors shortened from ten to six years.

In 1903 a certain further measure of concession was made:

by s. 31 of Act No. 1864 the present deadlock clause was adopted, but it merely permits a penal dissolution of the Council if it rejects a Bill from the Assembly which has been passed after a dissolution, arising out of the rejection of the same Bill. In return, s. 30 of the Act gave the Upper House full power to deal with Bills which merely imposed or appropriated fines or other pecuniary penalties, or provided for licence fees, and allowed it to suggest amendments, not increasing the burdens of the people, to any Bill at the committee stage, on report, and on the third reading. They can amend non-money clauses and at the same time suggest amendments in money clauses in the same Bill.[1] In general legislation the power of the Council is unquestioned: in 1909 it successfully threw out even a Land Tax Bill, and the Ministry did not dare to fight over it.[2] In 1910 it mutilated a Licensing Bill so that the Government dropped it, and insisted on large changes in the Electoral Bill—only agreeing to a certain compromise after discussion at a joint conference[3]; it declined to approve of the sale of coal from the Government mine to the public, and amended largely the Education Bill; and was so hostile to a Preferential Voting Bill that the Government dropped it.

The composition of the Upper House was, however, rendered more democratic in 1881 (Act No. 702), and in 1903 (Act No. 1864) by a drastic reduction of the qualifications for electors and members, originally fixed very high by the Act of 1855. But a property qualification is still required of members and of electors alike, and female suffrage was accorded only in 1908 by an Act assented to in 1909, and no election has yet been decided upon it.

[1] See *Parliamentary Debates*, ciii. 2964 seq. Cf. *Parl. Pap.*, 1894, No. 52.

[2] Cf. Commonwealth *Parliamentary Debates*, 1910, p. 4815; there was an absurd dispute in the same year as to the appointment of a Clerk to the Upper House, as the Government under Act No. 1075, s. 350 declined the recommendation of the President and made an appointment over his head; see *Legislative Council Votes*, September 27, 1910; *Debates*, 1910, pp. 1342 seq.

[3] See *Parliamentary Debates*, 1910, pp. 3302, 3348; above, p. 483. For a dispute over amendments of money clauses, see ibid., pp. 3813, 3823, 3853.

§ 2. South Australia

The relations between the two Houses in South Australia have been as unsatisfactory as in Victoria: it would be impossible to say that they had been more unsatisfactory, and it is true that the disputes have not resulted in such hopeless deadlocks as has been the case in the sister Colony. But that is due to the democratic character of the South Australian people, a fact which can be traced to the origin of the Colony as a home of free settlers, and to its immunity from the influence on the one hand of the criminal population, and on the other from the presence of Government officials and their friends, who secured to themselves, at the cost of the commonwealth, large grants of land.

In financial matters, as the Constitution had carefully left the matter totally undetermined beyond providing for the origination of such Bills in the Lower House, it was only found possible to work at all by an informal arrangement between the two Houses, the effect of which was that the Legislative Council would pass the ordinary annual estimates without insisting on amending them, but it would have a right to suggest amendments on every and any other proposal to raise money or warrant expenditure, and to ask for a conference on the estimates, and that matters beyond the ordinary annual estimates must be sent on separately, so that the Council could have an opportunity of expressing its opinion with regard to these measures.[1] The Council can freely amend any clause of any measure which is not a clause raising money or warranting expenditure.

It would be idle to deny that the Council was entitled to adopt this position. The idea that an elective Upper House should conform with the principles adopted by a nominated Upper House like the House of Lords, although

[1] Cf. *Parl. Proc.*, 1857–8, i, *passim*; ii, Nos. 71 and 101; *Debates*, pp. 340–70, 442, 456. In 1864 the Council again reasserted its position; in 1876 it caused the withdrawal of certain items from a Loan Bill, and in 1877 defeated the Government of the day and insisted on a proposal to build new Houses of Parliament being introduced separately; see *Parl. Proc.*, 1877, i, *passim*. Cf. Baker, *Constitution of South Australia*, pp. xii–xiv; Rusden, *Australia*, iii. 476–9. A land tax and an increment tax were rejected in 1910.

solemnly put forward by Sir Michael Hicks-Beach in 1878 in the case of Victoria, and though often asserted both at home and in the Colonies, was clearly a claim which could not be made good. Presumably, if the two Houses were elective and if the Upper House represented the wealth of the country, it was intended that the Upper House should have a free voice as to financial matters, and the agreement arrived at was intended in effect to maintain this free voice. Nor did it fail of its purpose, but of late years the Council has complained that the control of expenditure is passing from its hands.[1] But this seems to be due not so much to any formal breach of the agreement as to the loan policy of the Government, which leaves them a wide discretion in the application of the moneys raised by loan. On the other hand, the Council is aware that it cannot reject a Loan Bill, for a public works policy is not merely essential to the state but is extremely popular, and any effort to insist upon controlling this policy would end in disaster to the Council. None the less, in 1910 they insisted on cutting an item of £1,000,000 out of the Loan Bill for public works, as they had not agreed to the proposal for wharves construction.[2]

But if the Council must content itself with a lessening influence in financial matters pure and simple, they may reflect that they maintain an absolute predominance in all matters regarding ordinary legislation. They have never hesitated to reject year after year such Bills as they deemed unwise, and to amend as freely as they liked those which they accepted. The Workmen's Compensation Bill[3] has been long delayed by the repeated refusal of the Upper House to accept the principle, or rather the details, of a measure which has been in force for long in England, and has been adopted in the other Colonies, not even with the exception

[1] So they complained in 1908 of public works expenditure appearing in an ordinary Appropriation Bill which they could not amend; *Legislative Council Debates*, 1908, p. 622; and cf. *Chronicle*, December 26, 1908.

[2] See *House of Assembly Debates*, 1910, p. 1277; 1911, pp. 104–10, 192–4, 222–32, 251–60, 267–73.

[3] Cf. *House of Assembly Debates*, 1910, pp. 209, 255 seq.; 1911, p. 100; and see Adelaide *Advertiser*, December 2, 1910.

of Tasmania, which in 1910 has tardily come into line with the rest of Australia. It delayed for a long time the introduction of satisfactory land taxation, the main object of which was of course to break up large estates for closer settlement. Attempts have been made from time to time to render the Council more democratic, but the House has carefully restricted the efforts, and it is remarkable that in a period of fifty-six years so little has been done to change the constitution of the House. When created in 1856 by the *Constitution Act* it was provided that there should be eighteen members of the Council to have a term of office extending for twelve years, one-third retiring after four years and the state being one constituency. The franchise was fixed, as far as the rental qualification was concerned, at £25 a year. No change was made until 1881,[1] when the number of members was increased to twenty-four, in view of the increased population of the state, and the term of office was reduced to nine years, one-third of the members retiring every three years. The state was divided into four districts for electoral purposes. It was twenty years before the Constitution was again altered, though in 1899 a referendum taken under resolution of the Assembly of December 22, 1898, affirmed the principle of the householder suffrage as suggested in a Bill of 1898. In 1901 the number of members, in view of federation, was reduced to eighteen, and the term of office to six years, half to retire every three years. But not until 1907 was the £25 annual rental qualification reduced. It was only then reduced because of pressure exercised by Mr. Price's Government,[2] which had succeeded in inducing the Governor to grant a penal dissolution for the purpose of arranging for the steps contemplated in the Act of 1901 in the case of deadlocks, which had never yet

[1] See Act No. 236; a deadlock provision was introduced by s. 16. If after a Bill had twice passed in the circumstances given above (p. 536)—it was rejected by the Legislative Council, the Governor could dissolve both Houses or issue writs for the election of *one* or *two* members for each division of the Council electorate. So also Act No. 779 of 1901.

[2] Cf. *House of Assembly Debates*, 1906, Sess. 2, pp. 524 seq.

been put into force. The Governor granted a dissolution when he found that the Opposition could not form a Government; as the elections were favourable to the Ministry the Council decided to yield, and finally the franchise was fixed by Act No. 920 at £17 rental qualification, with a single vote, whereas the demand before had been at £15 rental qualification and a double vote.

In 1910 the Labour Government under Mr. Verran introduced into the Lower House and passed a Franchise Extension Bill, which was intended to confer the franchise on all those persons entitled to vote for the election of the members of the Assembly. In introducing this Bill the Chief Secretary quoted a remark by the present Leader of the Opposition in the House of Assembly, made on April 26, 1906:—

It had become intolerable that a body of eighteen men elected by 52,000 constituents, should have the power to veto the will, acts, and aspirations of a body of forty-two members, responsible to 179,000 people. That was against all notions of British constitutional government. The Council had become more and more representative of a class and of class interests. The people of New South Wales, New Zealand, and Queensland, with their nominee Councils, had much more political freedom than that enjoyed by the people of this state, and it was never intended by the Imperial Government that that should be so when responsible government was given to the Colonies one after the other.

The Legislative Council, however, showed no intention of accepting the proposal, and threw out the Bill.[1] The Government then prepared a Deadlocks Bill, but though it passed the Lower House [2] it went too late to the Upper House to be dealt with that year. A Veto Bill was passed by the Assembly in 1911, but rejected by the Council.

[1] In the same year the two Houses were divided in opinion as to the surrender of the Northern Territory; see Commonwealth *Parliamentary Debates*, 1910, pp. 4647 seq.; South Australia *Legislative Council Debates*, 1910, pp. 181 seq., 226 seq.; *House of Assembly Debates*, 1910, p. 717. Then the Upper House passed a Bill to repeal the Act of 1907 for the surrender, but the Lower House declined to accept it, and ultimately the Act was allowed to stand and the territory was surrendered.

[2] Cf. *House of Assembly Debates*, 1910, pp. 1110, 1184, 1248. It contem-

§ 3. Tasmania

In Tasmania the Upper House likewise has maintained an attitude of full equality of power with the Lower House, and it does not appear that there is any prospect of the relations between the two Houses being altered. In its financial relations to the Lower House the Upper House in practice goes beyond the principles laid down in the case of the Upper House of South Australia. That is to say, the ordinary estimates for the year will not be passed without question, and the power of amending may be used;[1] and anything except the most normal exercise of the power of the Lower House is a matter of question and examination, nor does the House restrict itself to suggesting amendments, but amends. The Upper House has rejected Appropriation Acts, and no successful attempt has been made to deal with the rejection.

As regards matters of ordinary legislation, thanks to the activities of the Upper House, Tasmania is by far the most backward state of Australia in respect of legislation for social needs. Every year Bill after Bill, if deemed too advanced, is rejected by the Upper House. Workmen's Compensation had to wait until 1910; land settlement and even Factory Acts are not appreciated, and the state had also until 1910 the distinction of having no system of wages boards or other means of controlling industrial conditions; in 1910 both a Factories Act and a Wages Board Act were passed. Moreover, the situation is complicated in Tasmania by the

plated a dissolution of both Houses after a Bill had been twice rejected (after a three months' interval in the same or the next session), and thereupon if the Bill were passed again a joint session should be held, whereupon any Bill would be presented for the royal assent if passed by a majority. In the Bill of 1911 no joint session is required; if the Bill is passed a third time it becomes law.

[1] *Legislative Council Journals*, 1877, pp. 39, 40, 117, 119; *Votes*, June 3, 10, 11, 1879. In 1879 the Upper House amended the Supply Bill, and eventually only agreed, on the refusal of the Assembly to accept the amendment, to a grant for eight months, of which six were over before the Bill was assented to. They justified their action by the financial difficulties due to faulty finance on the part of the Government. See also Rusden, *Australia*, iii. 479, 480.

adoption of the system of preferential voting, which results in the absence of any strong or clearly defined purpose in the Lower House. Further, the fact that the Legislative Council has eighteen members only, holding office for six years, and that the House of Assembly consists of thirty members, renders effective pressure by a small majority in the Lower House out of the question. The tone of the Upper House is decidedly plutocratic compared to that of the Lower House, for the elector must either be in possession of a freehold estate of £10 or a leasehold estate of £30 annual value, or be a graduate, a qualified legal or medical practitioner, a minister of religion, or an officer of the army or navy. On the other hand, democracy in Tasmania, partly owing to the presence in the country of a large number of persons of moderate means, is a feeble plant compared with democracy in other parts of Australia, and there does not appear to be any such degree of dissatisfaction with the relations between the two Houses as would lead one to expect that the powers of the Upper House will be lessened.[1] But there can be no doubt that Tasmania remains the least progressive part of the Commonwealth, from which, of course, it is separated in space and still more in feeling.

§ 4. Western Australia

In the case of Western Australia the period of the existence of the Parliament has been too short to render it possible to estimate what position the Upper House will achieve, whether it will gain the independent strength of the Upper Houses of Victoria, South Australia, and Tasmania, or whether it will moderate its claims and merely serve as a useful check on the Lower House.

[1] In 1908 it rejected proposals for a land tax, for land purchase, for hospitals, and for factory regulation; Hobart *Mercury*, November 21, 1908. In 1910 it threw out a Bill for closer settlement, despite the feeling throughout Australia that such settlement is urgently needed. The tenure of office by Councillors was reduced (see Act 49 Vict. No. 8) to six years, and the franchise has been made broader by 64 Vict. No. 5. The Lower House is powerfully influenced by Labour, which owes its strong position there to the preferential vote, as shown in 1909. See also above, p. 200.

It was suggested in the correspondence before the passing of the Constitution by Sir Napier Broome,[1] the Governor of Western Australia, that provision should be made to prevent tacking on the one hand, and on the other to obviate constitutional deadlocks. But Sir Napier Broome's suggestion, which was by no means a bad one, and which would seem to have been dictated by common sense, was not viewed with favour either by the Secretary of State for the Colonies [2] or by the Committee of the Legislative Council of the time, which was engaged in the study of the proposed Constitution, and the Constitution as it was issued contained no provisions on the subject, beyond the provision that appropriation and tax Bills must originate in the Legislative Assembly and that money votes or Bills must be recommended by the Governor.

Things remained comparatively in a satisfactory condition so long as the Upper Chamber was nominee, as was provided in the Act for the first six years, or until the population of the Colony attained 60,000 souls; but when the Legislative Council was appointed it was at once provided by the Act of 1893 [3] that in the case of a proposed Bill which, according to law, must have originated in the Assembly, the Legislative Council might at any stage return it to the Assembly with a message requesting the omission or amendment of any items or provisions, and the Legislative Assembly might, if it thought fit, return such omissions or amendments with or without alterations.

The Legislative Council has not hesitated to exercise this right, as indeed it is entitled to do, and it has maintained a close control over legislation,[4] so that the

[1] See *Parl. Pap.*, C. 5743, pp. 15, 36. He wished the Lower House after a period of eight months to be able to pass a Bill over the head of the Upper House—a drastic anticipation of the Imperial *Parliament Act*, 1911.

[2] *Parl. Pap.*, C. 5743, pp. 25, 26. Sir H. Holland preferred a nominee Upper House, which would in other matters have co-ordinate authority with the Lower House, but give way on money matters, as in Queensland.

[3] 57 Vict. No. 14, s. 23, repeated in 63 Vict. No. 19, s. 46. See *Parliamentary Debates*, iv. 621. The Council cannot insist on a request; see *Parliamentary Debates*, xxx. 3020, and cf. xxix. 1125.

[4] Compare its action in 1907 over the Land and Income Tax Bill, which it

Labour party have stated as one of their objects the intention of reducing the franchise of the Upper House, which also allows of plural voting.[1] It cannot be said that the franchise is very high, but it is desired by the Labour party to assimilate the franchise to that of the Lower House, which is, as is usual, manhood suffrage. The Upper House was understood to be quite determined to resist this change; on this point there was no means of bringing substantial influence to bear, and in 1909 the Council remained obdurate; in 1910–11, however, it wisely agreed to a reduction of the franchise.

§ 5. The Commonwealth of Australia

In the case of the Commonwealth the provisions of the Constitution are no doubt in part due to the fact that the Upper House is a body which represents the states as well as the people, and has thus a power such as no other Upper House has ever possessed, or is likely to possess. Thus the only restrictions on the power of that House are, in the first place, the fact that initiation of Money Bills is denied to it, and secondly, that it may not amend proposed laws imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government. But it is amply protected even in these cases by the fact that tacking is prohibited whether in appropriation or in taxation Bills, and that where it cannot amend it can suggest amendments and can reject. Moreover, in all other cases save those it can amend, and its power of proposing amendments allows it to evade the rule that it cannot amend to increase the burden on the people. The Parliament was a little slow in realizing its powers; in 1901 the old forms were used

threw out by a majority of two; the Governor then refused a dissolution and declined to allow ministers to resign, but prorogued Parliament for a time; then the Bill was reintroduced and carried with alterations; see Admiral Sir F. Bedford's speech, September 19, 1907; *Parliamentary Debates*, xxxi. 1504–6; above, pp. 199, 200.

[1] See *Parliamentary Debates*, 1910, pp. 3192 seq. In 1905 a referendum was proposed by the Labour Government to decide whether a single Chamber was not sufficient, and as to the franchise; ibid., xxvii. 534.

by the House of Representatives in sending up a Supply Bill purporting that a grant had been made by the Lower House : but the Senate at once asked for an amendment so as to remove the address to the Crown in the preamble, and to insert a schedule showing what the grant was for, and the Lower House consented after some discussion to the suggestion.[1] In 1904 the Governor-General's speech was altered so as at prorogation to convey thanks to both Houses for the grant, and at the opening of the session to refer merely to the originating of Bills for grants in the Lower House.[2] In 1901 the practice of printing in italics proposals as to fines and penalties which the House of Lords is allowed by custom to do, the Commons not objecting on grounds of privilege to this mode of suggesting amendments on small points like these, was omitted on the direction of the President of the Senate.[3]

Much more serious has been the question of the power to suggest amendments. In 1902, in the course of discussion of the Tariff Bill, the Upper House suggested a set of amendments : some were accepted, some rejected in the Lower House, but on the Bill being returned the Upper House still insisted on some and sent back new suggestions. Then the matter was solved by a compromise, as all were determined to get the tariff through : the Lower House without prejudice proceeded to consider the amendments, and there was in effect a compromise between the Houses,[4] but the Upper House passed a resolution[5] affirming that the action of the House of Representatives in receiving and dealing with the reiterated requests of the Senate was in compliance with the undoubted constitutional position and rights of the Senate. In 1908 the same performance was repeated : the Senate made one set of requests : some were granted, some returned ungranted : then they sent down a second set, and then the Lower House, to avoid a third set and a constitutional deadlock, decided to make a compromise with the

[1] *Parliamentary Debates*, 1901, pp. 1021, 1153, 1174, 1190, 1352, 1471 ; Act No. 1 of 1901. [2] Ibid., pp. 942–7.

[3] Ibid., p. 763. Cf. May, *Parliamentary Practice*,[10] pp. 460, 529, 548, 705.

[4] Ibid., 1902, pp. 15676 seq. [5] Ibid., pp. 15813 seq.

Upper House, both parties asserting their position, but the question being disposed of by concessions on either side.[1]

The Senate can clearly amend[2] a Bill so as to increase expenditure, as it did in the case of the *Property for Public Purposes Acquisition Act*, 1901, where the rate of interest to be paid by the Commonwealth was increased to $3\frac{1}{2}$ per cent. from 3 per cent. only.[3] It was, however, much disputed[4] over the *Sugar Bounty Act* in 1903, whether the Upper House could make the bounties on sugar retrospective, and so increase by amendment the burden on the people. It was argued by the Upper House that Appropriation Bills were subject to alteration just as expenditure Bills were, and that the increase of the burdens of the people did not result from an amendment of the appropriation, but from an Act to impose taxation which might be the result, and which they could not amend. But in point of fact the matter was settled by the withdrawal of the amendment, and the substitution of a request, and that and other cases in connexion with the Customs tariff have shown that though where the Upper House can amend it cannot increase the burden on the people, where it can only suggest it can suggest what it likes.

Further difficulties suggest themselves for consideration. In 1901 objection was taken to the introduction of non-recurrent items in the ordinary Appropriation Act, as, for example, the outlay in connexion with the royal visit in that year, and the matter was then disposed of on the ground that the Appropriation Act should contain, as all such Acts in the Colonies had done, such expenditure as would normally be submitted in connexion with estimates of the year for each department.[5] In 1910 there was a new

[1] *Parliamentary Debates*, 1908, pp. 11437 seq., 11588 seq.

[2] An analogous attempt in New South Wales failed; see *Parliamentary Debates*, 1910, Sess. 2, pp. 1316, 1440.

[3] Harrison Moore, *Commonwealth of Australia*,[2] p. 150.

[4] *Parliamentary Debates*, 1903, pp. 1691–1703, 1821–60, 2013–34, 2076–8, 2364–418, 2469–89.

[5] Ibid., 1901, pp. 1310 seq. The *Public Works Act*, 1900, ss. 28 and 31 of New South Wales requires that any public work costing over £20,000 must be approved by Act of Parliament (the Council having a free hand to

difficulty : the Bill for appropriating moneys for works and buildings in that year was separated from the ordinary Appropriation Bill as including new matter of great importance, and the Senate's right to amend was admitted. But in one item the Senate did not amend in the ordinary sense of the term by reducing or cutting out a vote, but altered the destination of a vote for land for a quarantine station by omitting the definition of its locality contained in the Act. The Speaker of the Lower House ruled that the amendment could not be accepted, as it altered the destination of the vote which had been recommended to the House by message from the Governor-General, a thing which the Lower House itself could not do. In the Upper House the Government endeavoured to have the amendment reversed, but with its usual disregard for mere party loyalty the attempt was defeated by seventeen votes to thirteen. Then Mr. Fisher in the Lower House decided to leave the item out altogether, and thus to show complete disagreement with the decision of the Senate, which was really due to a desire to avoid discomposing Hobart by an unhappy site for a quarantine station. This proposal was accepted, but there were energetic protests by both Mr. Kelly and Mr. Joseph Cook, which had the merit of raising clearly the point how the items could be said to be new matters which the Senate could amend when it could not amend the ordinary Appropriation Bills : the items in both were much the same sort of thing, and Mr. Cook renewed his earlier protest against the separation of the general Appropriation Bill and the works appropriation. The complaint seems in truth justified ; the really new items on the Works Bill, such as in the case of the works for the new capital, might well have formed the subject of a new Bill,[1] while the routine works should have

amend). An attempt to evade this rule was defeated in 1910 ; see *Debates*, 1910, Sess. 2, pp. 1412–8.

[1] Compare the inconvenient course adopted in 1910, when the appropriation for the works at the new capital was included in the Bill for public work appropriations, and only passed after an equal vote in the Senate, there being strong feeling that the site fixed on in 1909 was not the best.

gone into the ordinary estimates; the distinction between new salaries and new repairs or new works, and new motor-cars for the Post Office Service, is certainly more subtle than convincing or satisfactory.

The effect of the prohibition of tacking was considered by the High Court of the Commonwealth in the famous case with regard to the validity of the *Excise Tariff*, 1906 (No. 16).[1] It was attempted in that case by the Parliament of the Commonwealth to provide that a certain excise should be levied on all agricultural implements manufactured in the Commonwealth, with the proviso that the excise was not to be levied if certain conditions as to labour intended to secure reasonable remuneration for the workers were observed. The High Court by a majority decided for many reasons that the excise tariff was invalid. The Chief Justice, O'Connor and Barton JJ. held that, even if otherwise valid, the Act which if valid would have the effect of regulating the conditions of manufacture would be invalid as dealing with matters other than duties of excise contrary to s. 55 of the Constitution. Higgins and Isaacs JJ. did not agree with this contention, and urged that the Act was valid.

In general legislation the Upper House is at least the equal of the Lower. For example, such important Bills as the Navigation Bill have been introduced there, and all Bills sent up are freely amended, while the Upper House does not concern itself much with party ties. Thus in 1909 the Upper House rejected the Bill to arrange for the taking over of the northern territory of South Australia, despite all the efforts of Mr. Deakin to secure the passing of the Bill. The Upper House is also decidedly inclined to academic debating, and exercised its favourite occupation in 1910, when the Senate spent valuable time in passing a resolution in favour of women's suffrage for the benefit of the Prime Minister of England, which Mr. Asquith on its receipt by

[1] *The King* v. *Barger*, (1908) 6 C. L. R. 41. On the other hand, the penalty clauses in the *Customs Act*, 1901, which provides the general machinery of Customs administration, are not taxation; see *Stephens* v. *Abrahams*, 29 V. L. R. 201, at p. 229.

telegram duly acknowledged.[1] Or again, such interesting questions as that of elective Ministries may there be mooted.

The prediction[2] that federation would ruin responsible government or vice versa has not been realized: the Upper House has not attempted to claim control over the Government, and the traditions of responsible government have so far overwhelmingly prevailed.

In the case of the Commonwealth it was anticipated, as was natural, that the Upper House, with its fixed representation according to states and not according to population, would serve as a means of securing state interests against encroachments by the Federal Government.

This appears clearly to have been the view held by almost every one in the discussions preceding confederation, and it is decidedly curious that these discussions should in effect have been so singularly far from being fulfilled. The result might have been different had the Upper House been elected on a different franchise from the Lower House, but the Commonwealth *Franchise Act*, No. 8 of 1902, provided manhood and womanhood suffrage for both Houses, with the result that the only difference between the Houses is that the Upper House is elected on wider electoral districts than the Lower House, for the present each state being regarded as a single area, and therefore three senators being appointed at each election. The result has been that the Labour party, which is much better organized electorally than its opponents, have secured control of the Senate, and the Labour party is decidedly opposed to attributing to the states any rights beyond those which clearly belong to them under the Constitution.

§ 6. The Cape of Good Hope

In the case of the Cape of Good Hope even less useful purpose than usual seemed to be served by the Upper House, for it differed from the Lower House only in the

[1] *Parliamentary Debates*, 1910, pp. 6300 seq.

[2] Sir S. Griffith, Sir R. Baker, and Mr. Clark, were among the prophets —false ones, fortunately. See Quick and Garran, *Constitution of Commonwealth*, pp. 706, 707.

fact that the members had a property qualification; that they were elected for wider areas, and that plumping was allowed in elections for the Upper House but at no other elections. The result was naturally that the Upper House reflected as a rule the views of the Lower House very closely. Moreover, when the Houses were not in agreement, the express power of amending Money Bills given to the Upper House by the Constitution[1] was remarkable and inconvenient. The difficulty was well illustrated by the circumstances in which Dr. Jameson's Ministry found itself compelled to ask the Governor to dissolve Parliament. At the end of 1907 the Lower House sent up a Supply Bill to the Legislative Council. At that moment, by the defection of a member who had formerly supported his Ministry, Dr. Jameson ceased to have a majority in the Upper House. It was true that when the House was sitting the Government still had a majority, thanks to the President's casting vote, but when the House went into Committee to consider the Bill in detail the Government actually lost its majority and could make absolutely no progress with the Bill, nor could the House force the Committee to proceed with the Bill,[2] nor for want of a quorum dispense with the Committee stage.

In general legislation the Upper House again has acted as a co-ordinate body with the Lower House, and it cannot be said that the duplication of machinery has resulted in particular advantage to the country.[3] It has repeatedly had differences with the Lower House,[4] and in one case in 1898 it is said to have been instrumental in securing the carrying through of a redistribution scheme by the Government.[5] But all the same, it is difficult to see that it has done much good: for example, the legislation of 1887 and 1892 restricting the franchise as regards natives was carried quite easily in the Upper House.

[1] Ordinance No. 2 of 1852, s. 88. The Upper House could have amended Bills so as to increase the burden on the people; in practice it did not.

[2] *House of Assembly Debates*, 1907, pp. 582, 589, 590, 597; *Legislative Council Debates*, 1907, pp. 338–74; above, p. 211.

[3] Cf. *The Government of South Africa*, i. 422, 423.

[4] See Wilmot, *South Africa*, i. 189, 345. [5] See Wilmot, op. cit., iii. 347.

§ 7. South Africa

In the case of South Africa the Upper House is elective as regards thirty-two out of its forty members, but their position is altogether strange. The first eight are nominated by the Governor-General in Council, that is, on the advice of the Ministry of the day—it had been usual in similar cases to secure that the first nominations are made by the Crown, acting not necessarily on ministerial advice[1]—while the remaining thirty-two were chosen at special sittings of both Houses of the Legislatures of the four Colonies which form the Union.

Unless other provision is made by the Parliament of the Union, eight senators will continue to be nominated from time to time, while eight will be elected by the members of the Provincial Council together with the members of the House of Assembly selected for each province. The exact functions which will be performed by so remarkably constituted a body it is difficult to foretell.

The two Houses, following universal Colonial practice, are not put on the same level as regards Money Bills. No law which imposes taxation or appropriates revenue or moneys shall originate in the Upper House, and the Upper House may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the service of the state. Nor may the Senate amend any Bill so as to increase any proposed charges or burden on the people. But the provisions are safeguarded, as in the case of the Commonwealth of Australia, more satisfactorily than is usual in Colonial constitutions, for a Bill is not to be taken to appropriate money or to impose taxation merely because it imposes fines or other pecuniary penalties or provides for their appropriation.[2] Further, the

[1] Compare e.g. the plan followed in Canada in 1867, in New South Wales in 1856 and 1861 (see *Parl. Pap.*, H. C. 198, 1893, pp. 69–74), in Queensland in 1859, in the Transvaal and Orange River Colony in 1906 and 1907, all intended to avoid a purely ministerial mode of appointment. For the case of Western Australia, see *Parl. Pap.*, C. 5743, pp. 69, 70.

[2] Cf. 63 & 64 Vict. c. 12, Const. s. 53 (Commonwealth). So Victoria, Act No. 1864 s. 30. See also *The Framework of Union*, pp. 106 seq.

power to amend is only forbidden in so far as a Bill is what may popularly be styled a Money Bill; there is no doubt that the restriction is valuable, for a discussion had arisen in 1908 between the two Houses of the Parliament of the Transvaal as to the power of the Upper House to amend in any way the provisions—even non-financial—of a Bill which contains money clauses.[1] The strict wording of the Transvaal and Orange River Colony Constitution, which followed that of Natal, would seem to prohibit any amendment at all of such a Bill by the Upper House; this would, however, be unreasonable, if legal, and the ordinary common-sense rule would appear to be that which is established clearly for the Union. Further, the Lower House is, as in the Commonwealth, prevented from tacking by the provision that no Bill appropriating the revenues or moneys for the annual services of the Government shall deal with any other matter.

On the other hand, there is no provision in the Bill similar to that of the Australian Constitution which forbids the mixing up of other matters in taxing Bills, and requires that Customs and Excise taxation shall each be dealt with in separate Bills, while other taxation Bills must be confined each to a single subject. Again, there is no power given to the Upper House, as is now given by law or practice in the elective Upper Houses of the Australian States and to the Commonwealth Senate, to suggest amendments to—or even to amend in certain cases—Money Bills, a power which has enabled the Commonwealth Senate to suggest increased burdens on the people which they could not do by direct amendment. The exclusion of the Senate from any power in these matters is no doubt paralleled in Canada and in the other Colonies or States, where there are non-elective Upper Houses, but it is decidedly unusual in the case of an elective Upper Chamber, more especially as the Upper House of the Cape possessed by law the power of amendment and freely exercised it. The right of rejection still remains, and no doubt would be used—as even in Natal—in case of any save annual Appropriation Bills.

[1] Cf. *The Government of South Africa*, i. 405, s. 30.

The rule also is formally laid down that all appropriations must be recommended by the Governor-General; this is a commonplace of every Dominion Constitution since 1840, and only in the Bahamas and Bermuda is some degree of freedom still preserved to the individual member by law to propose money votes, a right tending to financial chaos.[1] The rule, however, does not apply to appropriation of fines or pecuniary penalties.

In one respect the Constitution is somewhat more advanced than any other Colonial Constitution. The provision in the case of deadlocks as originally drafted was as follows: if the Assembly passed a Bill and the Senate did not agree, or insisted on amendments to which the Assembly did not agree, the Governor-General might then convene a joint sitting of the Houses at which the Bill, with any amendments made by either House and disagreed to by the other House, should be deliberated upon and voted for. Any amendments which the majority of members sitting together approved, and the Bill itself as amended, if so approved, should be taken as passed, and the Bill should then be presented to the Governor-General for his assent. The nearest parallel for this procedure, which required no delay, no election, no referendum, and no dissolution, is to be found in the deadlock provisions of the Constitutions of the Transvaal and the Orange River Colony.[2] There, however, the procedure was much less simple; in the first place, the Bill must be carried twice by the Lower House, and that in successive sessions; then the Governor might

[1] Cf. *The Government of South Africa*, i. 408. Until 1856 the individual member could propose money votes in New Brunswick, but with responsible government the House reluctantly curtailed the privileges of the individual; see Hannay, *New Brunswick*, ii. 78, 178, 179. In Jamaica and the West Indies generally, until the surrender of the constitutions, the same right existed, and it also existed until responsible government in Nova Scotia and Prince Edward Island. For Canada, see 3 & 4 Vict. c. 35, s. 57.

[2] Letters Patent, December 6, 1906, s. 37; Letters Patent, June 5, 1907, s. 39. The effect of these provisions is incorrectly stated in *The Government of South Africa*, i. 416.

either dissolve the Houses, and after a general election and a repeated rejection of the Bill convene a joint session of the Houses, or if he preferred, he might at once convene a joint session. The former procedure involved considerable delay and a general election; the latter permitted of the whole matter being disposed of in the second session of Parliament. In the case of the Commonwealth,[1] from which the provisions in the Transvaal Constitution are borrowed with modifications, the procedure permits of the second passing of the Bill in question in the same session, but three months after the first rejection, and then the dissolution may take place, but it does not permit the simple holding of a joint session after the second rejection, and in this regard the Transvaal and Orange River Constitutions were more democratic. Perhaps this alteration was due to the fact that the Upper House in these Colonies was not to be in the first instance elective, and therefore it was felt that it would be impossible to insist always on a penal dissolution of the Lower House. The South African rule, as first drafted for discussion at the Natal Conference, was of remarkable simplicity; the whole thing could take place in one session, and there was no need for a second passing of the disputed Bill. The Upper House was thus certainly placed in a somewhat weaker position than any other elective Upper House in the Dominions, for as a rule any Bill passed by a substantial majority in the Lower House would be able to secure the majority in the joint sitting requisite for the passing of the law. On reconsideration, however, a second session was required to take place before a joint sitting could be held.[2] On the other hand, the Upper House will have power to amend laws in all questions of detail, and to exercise a revising power on legislation, and if it does this

[1] 63 & 64 Vict. c. 12, Const. s. 57; Quick and Garran, *Constitution of Commonwealth*, p. 687; Egerton, *Federations and Unions*, p. 256, n. 1.

[2] Save in the case of Bills for the appropriation of revenue or moneys for the public service (s. 63). It may be noted that the Upper House is only about a third in number of the Lower House, while in Australia it must be nearly a half.

its real object will be fulfilled. Probably the inconvenience caused to the late Cape Government by the strong position of the Upper House has induced the Conference to adopt this special form of legislation. The other Upper Houses in South Africa have, it may be noted, not played any great part in Colonial politics, and therefore the representatives of the Transvaal, Orange River Colony, and Natal most probably felt no great eagerness to establish an Upper House of too great strength. It is noteworthy that no attempt at a referendum on the Queensland model[1] was made.

[1] In *The Government of South Africa*, i. 417–23, the possibility of a unicameral legislature is suggested, and in 1909–11 one of the proposals regarding the Senate in Canada was its abolition, as in 1881 in the case of the Legislative Council of Newfoundland.

PART IV. THE FEDERATIONS AND THE UNION[1]

CHAPTER I

THE DOMINION OF CANADA

§ 1. The Origin of the Dominion

For many years after the union of Upper and Lower Canada in 1840 the attempted amalgamation worked as badly as could have been expected. It was natural to hope, as did Lord Durham, that in the end the Canadas would become thoroughly English and under an English Legislature, for the power of nationality was not realized in his day, and the error was, if not altogether pardonable, at least natural. But the French Canadians were suspicious of a measure which seemed destined to ruin their nationality, and in the beginning they had a serious grievance in the fact that, though the population of the lower province was very considerably greater than that of the upper province, the representation of both in the Legislature was the same. Soon enough, however, the grievance became the other way, and the British in the upper province became justly annoyed by the disproportionate representation of Lower Canada. But it was quite impossible to do anything, for the Bill to amend the proportions would have required two-thirds majorities in either House, and though a mysterious repeal of this section took place in 1854[2] in the Imperial Act which authorized the making of the Upper House elective, nothing ever came of the idea, as parties were too evenly balanced to permit of the carrying of such a measure. The principle was adopted in the first decade that the Government of the

[1] Cf. Egerton, *Federations and Unions in the British Empire* (1911).

[2] 17 & 18 Vict. c. 118, s. 5. See Garneau, *Histoire du Canada*, iii. 275, 376, for the controversy as to the origin of the change, which had not been asked for by the Legislature or Government.

day should always rule with a majority in both provinces of the Union, and Mr. Baldwin actually resigned in 1851[1] because the members of the upper province rejected a measure for a Court of Chancery. But the system was utterly rotten; the demand for an increase of the members for Upper Canada became more and more urgent, and a legislative *impasse* was on hand, for from May 1862 to June 1864 there were no less than five administrations, each of them quite without any real strength. Thereupon the leaders of the two parties decided to aim at a federation of the two Canadas if that alone could be managed, but preferably of all the Colonies then existing except British Columbia, which was in an altogether peculiar position from the other Colonies. The idea of federation had long been in the air; Lord Durham had glanced at it and suggested that a facultative power should be inserted in the Union Act; Nova Scotia had passed a resolve in favour of it in 1854, the Cartier-Macdonald Government of 1854 had mooted it; in 1858 Galt, in 1859 Brown pressed for it; but it was not until the whole machinery of the Government was in ruins in 1864 that the movement became at all real or actual, aided no doubt by the growing dread of the military preponderance of the United States and the need for union in defence. Fortunately the maritime provinces had just decided to confer for a maritime union, and delegates from Canada, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland met at Quebec in October 1864. Then in a long session there were drawn up seventy-two articles, the Quebec Resolutions, which were to serve as the basis of the constitution of the new federation, and in 1865 the measure was submitted to the Canadian Parliament and approved by large majorities; and next year, after the necessary preliminary preparations for the constitutions of the two provinces to be carved out of Canada, a deputation was sent to England to confer with the Imperial authorities.

[1] Turcotte, *Canada sous l'Union*, ii. 171–3; Macdonald, in *Confederation Debates* (1865), p. 30; Bourinot, *Constitution of Canada*, p. 39; Pope, *Sir John Macdonald*, i. 151, 182, 222, 245, 251, 335, 336; Dent, *The last Forty Years: Canada since the Union of* 1841, *passim*.

In New Brunswick there was a general election in 1865, which resulted in a majority against federation, but the Government resigned on a quarrel with the Lieutenant-Governor, and in 1866 the new election returned a majority in favour of federation. In Nova Scotia the people were never consulted at all: the Legislature, after long and anxious debate, decided in 1866 to adopt the measure in view of the pressure brought to bear by the Canadas and New Brunswick, and, through the Lieutenant-Governor, by the Imperial Government, despite Mr. Howe's violent opposition. In December 1866 there was a conference at London when the terms were finally settled, some minor financial changes being made in favour of the Maritime Provinces, and the Act was introduced into the Imperial Parliament and passed without amendment, though Messrs. Howe, Annand, and Macdonald offered a vigorous protest against the passing of the Act without consulting the people of Nova Scotia. It was then provided by Order in Council that the Act should take effect from July 1, 1867, and the first Parliament assembled in November, the period allowed being six months after the commencement of the Act. The members of the first Senate were nominated by the Crown in large measure, as had been agreed upon in the preliminary discussions, from the existing Legislatures, and their names appeared in the Union proclamation.[1] Lord Monk went out again as Governor-General, and at once chose Sir J. Macdonald as Prime Minister of the Dominion.

Prince Edward Island and Newfoundland remained out of the federation, though the Governor of Newfoundland was sanguine at first of including it, and the vast territories of the Hudson's Bay Company remained still not subject to the power of the Dominion. Canada had negotiated for years for their surrender, and now, with Imperial aid, terms of

[1] For the history of confederation, see *Parl. Pap.*, February 7, 1865, February 8, 1867, June 10, 1868; Pope, *Life of Sir John Macdonald*, i. 299 seq.; and *Confederation Documents*; Bourinot, *Canada under British Rule*, chap. viii; *Confederation Debates* (1865); Egerton and Grant, *Canadian Constitutional History*, pp. 352 seq.; Hannay, *New Brunswick*, ii. 209–70; *Hansard*, ser. 3, clxxxv. 557 seq., 804 seq., 1011, 1164 seq., 1313 seq.

surrender were arranged and the surrender of the charter was authorized by an Imperial Act of 1868.[1] The agreement was that in addition to certain lands the company should receive £300,000 from the Government of Canada. Immediately on the arrangement of the negotiations the Canadian Parliament proceeded to make legislative provision for the Government of the lands so acquired by a local Act.[2] It was also intended to send Mr. McDougall as administrator, but he was not received by his proposed subjects, and it required the dispatch of an armed force to complete the surrender of the rebels.[3] In the meantime the legal instruments for the entry of the lands of the company into the Dominion were completed, and a Canadian Act of 1870 made provision for the establishment of a new province with a legislature of two Chambers of the usual model. An Order in Council of June 23 under s. 146 of the *British North America Act* added the territories to the Dominion. Both the Acts for this purpose and that for the government of the territories were, however, of more than doubtful validity, and it was therefore found necessary by an Imperial Act of 1871 to ratify them and to lay down the important principles that Canada could erect new provinces out of the territories or other lands surrendered to it by the Crown, and that such provinces after their constitution would not be liable to have their constitutions altered by the Dominion Parliament. At the same time the Parliament of Canada was allowed to provide for the representation in the Parliament of the Dominion of the provinces which it should create from time to time, and also, with the consent of the provinces, to alter the boundaries of any of them and make the necessary alterations consequent on such changes of boundary. In 1871 the Province of British Columbia joined the federation on the understanding that the Dominion Government would

[1] 31 & 32 Vict. c. 105.

[2] 32 & 33 Vict. c. 3, and 33 Vict. c. 3; Imperial Act 34 & 35 Vict. c. 28.

[3] Pope, *Life of Sir John Macdonald*, ii. 49–55; Willison, *Sir Wilfrid Laurier*, i. 151 seq. McDougall is defended by Bryce, *History of the Hudson's Bay Company*, pp. 457–68.

secure the building of a railway line from the east to the west. It was also provided that the Dominion would consent to the introduction of responsible government into the province,[1] and that it would undertake in respect of it the same obligations in effect as it undertook in the terms of the *British North America Act* in respect of the other provinces. The terms were inclusive also of a pecuniary subsidy to the province, and on the other hand its Government surrendered the control over Indians and their lands to the Federation, a clause which was destined to produce difficulties later on, as the Dominion was to receive from time to time grants of land from the province, and the province and the Dominion cannot agree as to the extent of the lands thus to be transferred.[2] Another clause provocative of trouble was that with regard to lands to be surrendered by the province in respect of the new railway to be built, for in 1910 the question was carried to the Privy Council whether, despite the surrender, the province still did not possess full legislative power as to water rights over such lands, a power the Judicial Committee denied, and which affirmed would have made the bargain a very bad one for the Dominion.[3] The union of the province with the Federation was dated by the Order in Council of May 16 approving the terms of transfer to take effect from July 20, 1871.[4]

The next addition to the Dominion was that of Prince Edward Island, which was loath to join the Federation in 1867. The essential difficulty was the presence in the island of a number of large landholders, and the fact that the rest of the people could not obtain land for themselves,

[1] This was effected by, first, the creation of a representative legislature (one chamber of nine elective and six nominee members) by an Order in Council of August 9, 1870, under the Imperial Act 33 & 34 Vict. c. 66, and then by an Act of 1871 (No. 147) creating a constitution contemplating responsible government.

[2] The policy was to be at least as generous as that of the Colony. But that policy had *de facto* been very far from generous. See a return to an address of the Canadian House of Commons, January 28, 1908.

[3] See *Burrard Power Co.* v. *The King*, 43 S. C. R. 27; [1911] A. C. 87.

[4] Cf. also Canada *Sess. Pap.*, 1867–8, No. 59, pp. 3–7.

as the Crown had parted with the valuable public lands. Finally financial pressure was effective, and the resolution arrived at was that the province should be advanced the money to buy back the lands up to an amount not exceeding $800,000, and that the interest on this sum at a rate of 5 per cent. should be deducted annually from a sum of $45,000 paid by the Dominion to the province in view of its absence of Crown lands. On these terms being arranged the necessary addresses required under s. 146 of the *British North America Act* were passed, and by an Order in Council of June 26 the new province became part of the Dominion, with all the full rights of an original province, on July 1, 1873. The final addition was made to the territories of Canada in 1880, when, in deference to the wishes of the Canadian Parliament as expressed in 1878, the Imperial Government procured the passing of an Order in Council of July 31, 1880, adding all the territories in North America other than Newfoundland and its dependencies to the Dominion of Canada,[1] an Order in Council which, if not *ex initio* valid, was ratified *ex post facto* by the Imperial *Colonial Boundaries Act*, 1895, passed to set at rest the long and fruitless discussions as to the power of the Crown to alter the boundary of a Colony by the prerogative alone, a power which had at any rate been as freely exercised as it was doubtfully valid. Newfoundland, which was represented at the conference of 1864, has never joined the Dominion, though there was discussion of union in 1895 during the financial crisis following the failure of the banks. The present state of feeling in the people of the Colony is dead against union, while the politicians on either side at each general election find no more damaging attack to make upon the opposite side than that they are secretly favouring confederation, and the movements of a prominent politician at that time are watched with the most rigorous scrutiny.[2]

[1] Cf. Canada *House of Commons Debates*, 1878, p. 2386. There were doubts as to the north and north-east boundaries of the Hudson's Bay territories and Rupert's Land.

[2] Cf. *Canadian Annual Review*, 1909, pp. 36–9, for the counter-accusations

The Dominion now contains two further provinces, for in 1905 its power was used to carve out from its territories Alberta and Saskatchewan with full provincial rights subject to certain minor modifications: there had been since 1897 modified provincial rights in the territories now erected into provinces, but the real provincial status dates only from 1905 (4 & 5 Edw. VII, cc. 3 and 42). Besides the nine provincial Governments there is the Government of the Yukon, which is midway between the provincial status and the status of the Government of the North-Western territories.

§ 2. The Provinces and the Dominion

The Dominion is a self-governing Colony in the technical sense of the term, and the provinces are only parts of such a Colony, and therefore as entities in the colonial system the provinces disappeared entirely with the creation of the Federation. Nothing marks more clearly the position of the provinces than that the executive head of the province, the Lieutenant-Governor, is appointed by and paid by the Dominion Government, and the legislative enactments of the Provincial Legislatures are subject to disallowance by the Dominion Government. Moreover, the Provincial Government receives no recognition from the Imperial Government; the Agents-General of the provinces in London receive none of the official status accorded to the Agents-General of the Australian states even after federation and to the High Commissioner of Canada; while the title 'Honourable' is restricted to Executive Councillors while such, and to the President of the Council and Speaker of the Assembly while in office. Then, again, for all purposes of law the Governor-General of Canada is, in virtue of the *Interpretation Act*, 1889, the Governor of a Colony, and no function of a Governor under an Imperial Act falls upon a Lieutenant-Governor in a Canadian province. On the

of intention to federate urged by Sir R. Bond's and Sir E. Morris's supporters. It is doubted locally if a change of position would be beneficial, and as long as the Colony is prosperous federation is not probable. See also Prowse, *History of Newfoundland*, pp. 494, 495.

other hand, it has been held by the High Court of the Commonwealth[1] that the powers conferred on Governors by the *Fugitive Offenders Act*, 1881, are still conferred upon the Governors of the states, and that the Legislature and the Executive of the Commonwealth are only a central body in the sense in which it excludes subordinate bodies when the Legislature of the Commonwealth has power to legislate, and perhaps only when it has done so. It is perfectly true that the provinces retain many powers and a wide sphere of operations, and they can often be regarded as illustrating the principles of the law affecting responsible government, but their position is one of infinitely greater theoretic inferiority to the Dominion than that of the States of the Commonwealth; it is another matter whether the practical difference is so great as the theoretical.[2]

In the constitution of the Senate of the Dominion it was contemplated providing some protection for the interests of the provinces as such. Accordingly the Dominion was divided into three sections, Ontario, Quebec, and the Maritime Provinces of Nova Scotia and New Brunswick, each with twenty-four members. It was added also that the number should be left the same if Prince Edward Island were added, but increased if the Colony of Newfoundland came into federation. Then the Imperial Act of 1871 authorized the addition of members for the new provinces, and there are now in all eighty-seven members, including four each for Manitoba, Saskatchewan, and Alberta, and three for British Columbia, the territories outside the provincial area not being represented in the Senate. In the case of the House of Commons the plan adopted was to fix the number at sixty-five for Quebec and then to fix

[1] *McKelvey* v. *Meagher*, 4 C. L. R. 265.

[2] The Canadian Government often refuses to forward provincial representations to the Imperial Government. Thus the desire of British Columbia in 1907–8 for an Imperial Commission to inquire as to Asiatic immigration was never sent home for consideration. On the other hand, the resolutions of the Nova Scotia House of Assembly of February 1894 as to the abolition of the Upper House were sent home without comment (cf. *House of Assembly Journals*, 1894, App. No. 17).

a number for the other provinces based on the decennial census. The original House consisted of 181 members, of whom eighty-two were for Ontario, nineteen for Nova Scotia, and fifteen for New Brunswick. The changes in population, and the addition of new provinces which are represented in the House of Commons under the Imperial Act of 1871, have changed the proportions, and there were, after 1905 saw the addition of two new provinces, then in the House eighty-six members for Ontario, sixty-five for Quebec, eighteen for Nova Scotia, thirteen for New Brunswick, ten for Manitoba, seven for British Columbia, four for Prince Edward Island, four for Alberta, four for Saskatchewan, and one for the Yukon territory. The number is now 221, Alberta having seven and Saskatchewan ten members respectively; automatic change has distressed very greatly the Maritime Provinces and especially Prince Edward Island, which sees itself at no distant date sure to be left with no representation at all, and a case has been brought to decide the claim of the province that the minimum number given at the time of joining the Union must be held to continue good for all time: the rejection of this contention [1] has resulted in petitions from the province for the passing of an amendment to the *British North America Act* to secure this result, but so far without any success.[2]

It will be seen that there is no really satisfactory federal character about this House at all, and this is one of the points which show how really different the Canadian Constitution is from that of the United States: there is merely a decided attempt to secure Quebec a definite place, and nothing more: the threatened extinction of the representation of the province of Prince Edward Island, and the very small representation of the provinces generally, shows clearly that the model of the Parliament is the unitary Parliament of the United Kingdom. It may be added

[1] Cf. *Canadian Annual Review*, 1908, pp. 593, 594. See *Attorney-General for Prince Edward Island* v. *Attorney-General for Dominion of Canada*, [1905] A. C. 37; 33 S. C. R. 564.

[2] Ibid., 1907, p. 426; 1908, pp. 32 seq.

that the Senate has never made the slightest sign of being a stronghold of provincial interest: on the contrary, the constant agitation for its reform[1] indicates quite clearly that it has no federal character at all.

§ 3. The Lieutenant-Governor

As in the case of the Imperial control over the Colonies, the Dominion control over the provinces is in part secured by the appointment of the chief executive officer, the Lieutenant-Governor. He holds office for five years, but he may be dismissed before that time for reason assigned,[2] which must be communicated to Parliament within a week if it is sitting, or within a week of its meeting if it is not in session at the time when the order is made. The officer is expected to observe the rules of responsible government in his dealings with the province, and he as a rule does so. It was indeed contended in the case of Mr. Luc Letellier[3] that a Lieutenant-Governor was a constitutional monarch, and for any act done as head of the provincial authority subject to no control from the Dominion Government. This doctrine was denounced by Sir John Macdonald, and his view was approved by the Secretary of State. It is, indeed, obvious that the Lieutenant-Governor cannot stand towards the Dominion Government in any other position than does a Governor of a Colony to the Imperial Government.

The cases of Mr. Letellier and of Mr. McInnes[4] which have been cited above in connexion with the relation of a Governor to his ministers show clearly the difficulties of the position where, as in the Dominion, the Lieutenant-Governor is normally chosen from the party in power and knows that he can indirectly help that party at the elections to the Federal Parliament. For it must be remembered that Federal ministers frankly intervene in provincial politics, from which they have most of them graduated to the politics

[1] *Canadian Annual Review*, 1907, p. 426; 1908, pp. 34–6; 1909, pp. 225, 226; 1910, pp. 255, 256; above, pp. 588, 589.

[2] No Court could question the reason; it is a political matter, but a cause must be assigned to facilitate a parliamentary contest.

[3] *Parl. Pap.*, C. 2445.

[4] Canada *Sess. Pap.*, 1900, No. 174.

of the Federation. At the 1908 elections for the Federal Parliament Mr. Pugsley was expected to carry for the Federal authorities his former province of New Brunswick,[1] and Mr. Fielding did carry his Province of Nova Scotia. But on the whole, it must fairly be said that the plan has not worked badly, and that most Lieutenant-Governors [2] are content to work in harmony with the party which may have a majority in the Legislature, though, especially of late years, the rule has been for the Federal Government to have Opposition parties victorious in the Provincial Legislatures. For example, Ontario under Sir J. Whitney since 1905 is a great and flourishing province, and in provincial, and also in a measure in Federal politics, it is in opposition; but none the less co-operation between the Governments has been quite satisfactory. It was not until 1903 that a second Conservative province came into existence in the shape of British Columbia (Manitoba being Conservative since 1900), but since then Conservatism has steadily advanced, and in 1911 even in Nova Scotia the Opposition gained ground.

The old view that the Lieutenant-Governor is a mere creature of the Governor-General, which was at the bottom of the disputes on the question of the power to appoint Queen's counsel and to pardon offenders against provincial laws and so forth, may be regarded as entirely gone. By virtue of their commissions from the Governor-General and by virtue of the terms of the *British North America Act* creating the Governments of the two re-separated provinces and continuing those of the Maritime Provinces, taken in conjunction with the terms on which British Columbia and Prince Edward Island joined the Union and the Acts creating the Provinces of Manitoba, Alberta, and Saskatchewan, there is no doubt at all about the Lieutenant-Governor being representative of the Queen and having full powers to

[1] As a matter of fact New Brunswick went Conservative in the provincial elections; but in 1903 Mr. Pugsley had been irresistible.

[2] So the Lieutenant-Governor of New Brunswick in 1908 declined to appoint nominees of his beaten Ministry to office.

perform all the acts for a province which a Governor may perform for a Colony, as for instance, the appointment of officers, the dismissing of officers, the summoning, proroguing, and dissolving of Parliaments, and so forth. The power of pardon is given by local statutes in all the provinces, and the power of altering the Great Seal is given by Imperial statute in the case of the new Provinces of Ontario and Quebec and by local Acts in the old provinces which joined the Federation, and by the constitutions in the case of the created provinces.

The real position of the Lieutenant-Governor is that he is the wielder of the executive power of the province in its entirety, just as a Colonial Governor wields the power of the Colony. Some confusion has crept into the discussion of his position as the result of the vague use of the prerogative. In its widest sense all executive government may be called a part of the prerogative, but the term is perhaps more generally applied merely to that portion of the executive authority which rests not on statute but on the common law. It may be more convenient to adopt the wider use of the term, and to ascribe to the Governor of a Colony and the Lieutenant-Governor of a province the royal prerogative, but it must be remembered that the prerogatives they wield are those appropriate to a Colony or province, and, as has been already seen, these prerogatives are not co-extensive with those of the Crown in the United Kingdom. When this view is borne in mind, it is easy to see that Lefroy[1] is wrong in rejecting the arguments of the Ontario Government in the Lieutenant-Governor's most admirable dispatch of January 22, 1886,[2] those of Mr. Blake in the

[1] *Legislative Power in Canada*, pp. 90–122. He fully admits that Lieutenant-Governors represent the Crown—the question is how far they do so. But he seems wrong in treating Blake's views as those of Higinbotham; Blake does not say that the executive power is given by the Act of 1867 in the sense in which Higinbotham held that the Act of 1855 gave it in Victoria. For incorrect views see the references on p. 106, note 1, and Lord Granville's dispatch of February 24, 1869, in Canada *Sess. Pap.*, 1869, No. 16; Lord Carnarvon's dispatch, January 7, 1875, in *Sess. Pap.*, 1875, No. 7.

[2] Ontario *Sess. Pap.*, 1888, No. 37, pp. 20–22.

Executive Power Case, 1892, of Mr. Justice Burton in that case,[1] of Mr. Justice Loranger,[2] of Chief Justice Higinbotham,[3] and Mr. Justice Kerferd,[4] though both in a Colony proper and a province the prerogative is rather delegated than given by legislation, as the Victorian judges thought. The executive power is vested in the Crown and its representatives: it is not conferred but regulated by law. The only real question is what prerogatives are necessary for the provincial form of government, and differences of opinion as to these matters are of course possible. The decision of the Privy Council that the provinces were entitled to escheats, in *The Attorney-General of Ontario* v. *Mercer*,[5] is fatal to any other view than that the Lieutenant-Governor possesses the provincial executive authority.

The same principle was also asserted in the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*,[6] when the question at issue was the priority of the Provincial Government over other simple contract creditors in connexion with the liquidation of that bank.

In connexion with that liquidation the Supreme Court of New Brunswick decided that the Provincial Government was entitled to payment in full, in preference both to note-holders of the bank and to other depositors and simple contract creditors of the bank. The Supreme Court of the Dominion answered the first question adversely to the Provincial Government, but agreed with the Supreme Court of New Brunswick with regard to the second question.

[1] 19 O. A. R. 31, at p. 38.

[2] *Letters upon the Interpretation of the Federal Constitution*, pp. 10, 11.

[3] 14 V. L. R. 349, at p. 397.

[4] Ibid., at pp. 409, 411.

[5] 8 App. Cas. 767.

[6] [1892] A. C. 437. Cf. *Molson* v. *Chapleau* (1883), 3 Cart. 360, at pp. 365, 366, per Papineau J.; *Reg.* v. *St. Catherine's Milling and Lumber Co.*, (1884) 13 O. A. R. 148, at pp. 165, 166; 4 Cart. 192, at p. 207, per Burton J. A.; *Mercer* v. *Attorney-General for Ontario*, (1881) 5 S. C. R. 538, at p. 637, per Ritchie C. J. See also *Maritime Bank* v. *The Queen*, 17 S. C. R. 657; (1888) 27 N. B. 351; *The Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, (1889) 20 S. C. R. 695; 27 N. B. 379; Lefroy, op. cit., pp. 72 seq.

From this decision the liquidators appealed to the Privy Council. It was there argued at length for the appellants that the effect of the Act of 1867 was to terminate any direct connexion between the Crown and the provinces; the Governor-General of Canada alone represented the Crown, and the Lieutenant-Governor of each province did not. Certain portions of the prerogative were given to the Lieutenant-Governors, and such a partial grant was inconsistent with the claim that they represented the Crown entirely. Otherwise if both the provinces and the Dominion possessed full prerogative rights, the Crown as representing the one might contend with the Crown as representing the other. It was admitted that if the provinces possessed the rights which the Colony had before 1867 the priority would certainly have existed, but the scheme of the Act of 1867 was to establish a local Executive and Legislature under a Lieutenant-Governor who was appointed by the Governor-General and not by the Queen, with functions different from the old Government and Legislature, and with powers limited and defined by statute and municipal in their general character.

On the other hand, it was argued that the true effect of the Act of 1867 was to leave the Provincial Governments and Legislatures supreme within their own spheres, while the Federal Government and Legislature were supreme within their sphere.

The judgement of the Privy Council was in favour of the respondents. They quoted and approved the decision of the Supreme Court of Canada in *Reg.* v. *The Bank of Nova Scotia*,[1] which had held that the Crown as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank was entitled to priority over other creditors of equal degree. They referred to their decision in *Exchange Bank of Canada* v. *The Queen*,[2] on the ground that they had

[1] (1885) 11 S. C. R. 1, where the Oriental Bank Corporation case, 28 Ch. D. 64, and *in re Bateman's Trust*, 15 Eq. 355 were followed.

[2] (1886) 11 App. Cas. 157. Cf. as to forfeiture on conviction of felony, *Dumphy* v. *Kehoe*, (1891) 21 R. L. 119.

asserted the same principle of the prerogative of the Queen being as extensive in Her Majesty's Colonial possessions as in Great Britain where it was not expressly limited by local law or statute; in that case they decided that by the law, the Civil Code and Procedure Code of the Province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. If the prerogative existed it also was available to the provinces, which would otherwise be reduced to the rank of dependent municipal instrumentalities, but for this contention the Privy Council was unable to find either principle or authority. They continued :—

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.[1] The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by s. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion,

[1] This passage serves as a useful reminder of the incorrectness of the doctrine as developed by Mr. Higinbotham to mean that no instructions could be given to a Colonial Governor by the Crown, and asserted by the Parliament of Victoria, December 22, 1869; *Parliamentary Debates*, ix. 2670, 2671. Lefroy, op. cit., p. 121, is quite right in repudiating this doctrine, but it is not involved in Mr. Blake's views or those of Burton J., and the Ontario Government.

and as supreme as it was before the passing of the Act. In *Hodge* v. *The Queen*,[1] Lord Fitzgerald, delivering the opinion of this Board, said : 'When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.' The Act places the constitutions of all provinces within the Dominion on the same level ; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word ; and, within the limits assigned by s. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

The Privy Council were of opinion that the case for the respondents really rested on the fact that the Lieutenant-Governor was appointed and could be dismissed by the Governor-General, but that the argument ignored the fact that by s. 58 the provincial Lieutenant-Governor was appointed by the Governor-General in Council by instrument under the Great Seal of Canada, or, in other words, by the Executive Government of the Dominion, which was by s. 9 expressly declared to continue and to be vested in the

[1] 9 App. Cas. 117.

Queen. There was no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who had no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment was within the meaning of the statute the act of the Crown, and a Lieutenant-Governor when appointed was as much a representative of Her Majesty [1] for all purposes of provincial government as the Governor-General himself was for all purposes of Dominion government.

The Privy Council added that ss. 109 and 126 of the Act specified the revenues reserved to the provinces. If the Act had severed the Crown and the provinces, the provisions in these Acts that the territorial revenues should belong to the provinces would not be consistent with their remaining vested in the Crown, but it had been held in several cases that all the subjects described in s. 109 were vested in Her Majesty as the sovereign head of each province; and s. 126, which embraces provincial revenues other than those arising from territorial sources and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, was expressed in language which favoured the right of the Crown, because it described the interests of the provinces as a right of appropriation to the public services. Seeing, therefore, that the successive decisions of the Board in the case of territorial revenues were based upon the

[1] Cf. his assent as the assent of the Crown in *Théberge* v. *Landry*, 2 App. Cas. 102, at p. 108; Lefroy, op. cit., pp. 92 seq. In *Molson* v. *Lambe*, M. L. R. 2 Q. B. 381, 1 S. C. 264, the objection was actually taken to a Provincial Act that it ran in the name of the Queen, but it was abandoned before the Supreme Court, 15 S. C. R. 253. But in *Lenoir* v. *Ritchie*, 3 S. C. R. 575, the Supreme Court denied that the assent of the Lieutenant-Governor to a Provincial Act authorized the appointment of Queen's Counsel and the grant of precedence, overruling the Supreme Court of Nova Scotia (Canada *Sess. Pap.*, 1877, No. 86). And in 1875 the Minister of Justice said the use of the Queen's name in the Acts was improper (*Provincial Legislation*, 1867–95, p. 99). There is no difference in the form of enactment by Queen or Lieutenant-Governor; Jenks, *Government of Victoria*, p. 245, is wrong in this regard. Cf. above, p. 458, n. 1.

general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appeared to the Privy Council that so far as regards vesting in the Crown the same consequences must follow in the case of non-territorial provincial revenues.[1]

It is important to notice that the position of Lieutenant-Governor and his functions cannot be affected by any Canadian Act whatever, not excepting a Federal Act, for the power to alter the constitution given by the *British North America Act* to each provincial legislature does not extend to altering the provisions of the Imperial Act regarding the position of Lieutenant-Governor, and the Dominion Parliament has no express or implied authority to affect the constitution of a province. But it is no alteration of the position of the office merely to confer on him fresh power and duties.[2]

On this subject there has been a good deal of discussion by Ministers of Justice in Canada. Thus in 1887 an Act of Manitoba (48 Vict. c. 2) respecting the Lieutenant-Governor was disallowed.[3] That Act created the Lieutenant-Governor and his successors a corporation sole, required that all bonds, recognizances, and other proceedings at law should be taken in the name of his office and be recovered by him in his name of office and should not vest in him personally. It empowered him to create deputies to sign marriage licences, money warrants, letters patent of incorporation, licences to incorporate companies, &c., and commissions under any Act of the Legislature. Sir John Thompson held that the making

[1] What would happen if the Dominion, the Province, and the Imperial Government were all creditors of a Canadian bank and there were insufficient assets to pay them all? There is no authority, but counsel in this case before the Supreme Court of New Brunswick answered that they would share *pro rata*, which seems good sense; see 27 N. B. 379, at p. 385. This case is not really so opposed to the view of Fournier J., in *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 S. C. R. 343, at p. 363, as Lefroy, p. 82, suggests. The Crown is one, but has different aspects; cf. the Privy Council in *Dominion of Canada* v. *Province of Ontario*, [1910] A. C. 637, at p. 645.

[2] Lefroy, *Legislative Power in Canada*, pp. 100–12, 239, 295, 296.

[3] *Provincial Legislation*, 1867–95, p. 821.

of the Lieutenant-Governor a corporation sole, and allowing him to appoint deputies, were *ultra vires*, and the same fate befell a Quebec Act on the same subject (49 & 50 Vict. c. 98).[1] In 1889 a discussion was carried on on this topic between Sir J. Thompson and Mr. Oliver Mowat, Attorney-General of Ontario, regarding the validity of the Ontario Act (51 Vict. c. 5) regarding the executive authority in the Province. He thought the whole Act conflicted with the *British North America Act*, s. 92 (1), and he particularly objected to the assumption of pardoning powers over provincial offences. Mr. Mowat totally dissented, and argued that the legislature could not merely alter or abolish the powers (which Sir J. Thompson admitted), but could add to them, and he remarked that the remission of penalties had already by law (48 Vict. c. 13, s. 16 (3)) been entrusted to the Lieutenant-Governor.[2] It was afterwards agreed to take the matter before the Courts, and it was so taken, and the validity of the Act was upheld both in the Ontario Supreme Court,[3] the Court of Appeal,[4] and in the Supreme Court of Canada,[5] but the grounds were in the main that as the Act purported only to legislate so far as the legislature had authority—a phrase frequently[6] adopted to render valid doubtful Acts—it might well be valid, without determining whether every power claimed in it was actually valid. Accordingly a Quebec Act of 1889 (c. 12) on the same head was left in operation,[7] a Manitoba Act of 1890 (c. 15),[8] and a New Brunswick Act of 1889 (c. 7)[9] were allowed to stand, and since then the provinces all include in their *Revised Statutes*, or Acts respecting the office of Lieutenant-Governor, analogous stipulations. The matter was discussed again[10] in connexion with a British Columbia Act, 62 Vict. c. 16, which

[1] *Provincial Legislation*, 1867–95, pp. 314, 338. [2] Ibid., pp. 206–10.
[3] *Attorney-General of Canada* v. *Attorney-General of Ontario*, 20 O. R. 222.
[4] 19 O. A. R. 31.
[5] 23 S. C. R. 458. Gwynne J. (at p. 475) dissented and held the Act *ultra vires* as an alteration of the position of Lieutenant-Governor forbidden by s. 92 (1).
[6] Cf. Boyd C., in 20 O. R. 222, at p. 246.
[7] *Provincial Legislation*, 1887–95, p. 432. [8] Ibid., p. 929.
[9] Ibid., p. 752. [10] Ibid., 1899–1900, p. 133.

gave the pardoning power, but that was allowed to remain in operation.

It is laid down by Lefroy [1] that as a normal rule executive power [2] and legislative authority are co-ordinate, i.e. that the legislature can deal with the mode of exercise of the executive power in its whole extent, not that it creates that power, and this is clearly the case with regard to the Lieutenant-Governors, who derive all their authority from their commissions which do not confer on them any other powers than those expressly given by the Act of 1867, and those necessarily pertaining to the office, for the Governor-General cannot delegate any other powers than those. It should be noted that prior to 1878 it was the custom for the Crown to delegate powers of proroguing and dissolving the provincial legislature. This provision Mr. Blake in 1876 represented as needless and undesirable, as the powers existed already *virtute officii*, a view in which the Imperial Government acquiesced, omitting the power from the letters patent issued for Lord Lorne. The Crown could of course delegate other than provincial prerogatives, e.g. allow Lieutenant-Governors to pardon criminals under Canadian law in each province, but this is not done. On the other hand, the legislatures cannot regulate or confer any executive powers save those on matters within their scope, as, for instance, the right to remit penalties imposed by provincial laws.

[1] Op. cit., pp. 123 seq. Cf. *The Queen* v. *Pattee* (1871), 5 O. P. R. 292, at p. 297; the *Executive Power Case*, 20 O. R. 222; 19 O. R. 31; 23 S. C. R. 458.

[2] The prerogative and executive power are sometimes used as convertible terms (e.g. by Barton, *Melbourne Federal Debates*, pp. 2253, 2254; Quick and Garran, *Constitution of Commonwealth*, p. 406; cf. pp. 472, 707; and the Ontario Government, *Sess. Pap.*, 1888, No. 37); sometimes the prerogative is restricted to the discretionary power of the Crown as opposed to power regulated or granted by statute. Cf. Anson, *Law of the Constitution*[3], II. i. 3; Dicey, *Law of the Constitution*[7], pp. 420 seq, In any case, prerogative means more than executive power, for there is a judicial prerogative and a legislative prerogative also. A Governor has a full delegation of executive authority as regulated or granted by statute, but not necessarily of other executive authority.

§ 4. The Legislative Powers of the Dominion and the Provinces

It appears to have been the intention of the framers of the Constitution of the Federation[1] to devise a plan in which there should be no overlapping of authorities : that is, at least, a conclusion which has been derived from the fact that, save as regards education and immigration and agriculture, they seem to have thought that conflicts were impossible, and so made no provision regarding them. The distribution of legislative power is set out in detail in the following sections of the *British North America Act*, 1867 :[2]

VI.—Distribution of Legislative Powers

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all matters coming within the Classes of Subjects next hereinafter enumerated[3] ; that is to say,—

[1] See Sir J. Macdonald, *Confederation Debates* (1865), p. 32.

[2] The classical commentaries on the Act are still Wheeler, *Confederation Law*, and Lefroy, *Legislative Power in Canada*, but both works are practically fifteen years old. The leading cases up to 1896 are printed in Cartwright, *Cases on the British North America Act* (5 vols.).

[3] See Canada *Revised Statutes*, 1906. Divorce is the chief subject on which no legislation has been passed.

The term 'exclusive' merely applies to exclusion of provincial authority. This is now definitely decided, though at one time doubted ; see Draper C. J., in *Reg.* v. *Taylor*, 36 U. C. Q. B. 183 ; Chauveau J., in *Holmes* v. *Temple*, (1882) 8 Q. L. R. 351. *The Royal*, 9 Q. L. R. 148, is also cited in this sense, but this is an error, for the Canadian Act, 36 & 37 Vict. c. 129, which altered s. 189 of 17 & 18 Vict. c. 104, was legalized by the permission to alter that Act given in s. 547 of the Act itself as regards registered vessels,

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.

and Lefroy, op. cit., p. 212, note 2, is mistaken on this point. On the other hand, see *Smiles* v. *Belford*, (1876) 23 Gr. 590; 1 O. A. R. 436; *Routledge* v. *Low*, (1868) 3 H. L. 100; *Tai Sing* v. *Maguire*, (1878) 1 B. C. (Irving), at p. 107; *ex parte Worms*, 22 L. C. J. 109, at p. 111, per Dorion C. J.; *Reg.* v. *The College of Physicians and Surgeons of Ontario*, 44 U. C. Q. B. 564; *Metherell* v. *The Medical Council of British Columbia*, (1892) 2 B. C.(Cassidy), at p. 189. See also *City of Fredericton* v. *The Queen*, (1880) 3 S. C. R. 505, at pp. 529, 530; *Attorney-General of Canada* v. *Attorney-General of Ontario*, (1890) 20 O. R., at p. 245; the *Thrasher Case*, (1882) 1 B. C. (Irving), at p. 214; *ex parte Renaud*, (1873) 1 Pugs. 293, at p. 274; *Merchants' Bank of Canada* v. *Gillespie*, (1885) 10 S. C. R. 312 (this case is wrongly decided, for the Companies' Act of 1862 did not apply to the Colonies); and the copyright controversy in Part V, chap. viii; Canada *Sess. Pap.*, 1875, No. 28; 1890, No. 35; 1892, No. 81; 1894, No. 50; Cornewall Lewis, *Government of Dependencies*, pp. 91, 92, 155, 156; Bourinot, *Canadian Law Times*, ix. 193 seq.; Lefroy, op. cit., pp. 208–31. The *Colonial Laws Validity Act*, 1865, applies beyond doubt to the provinces, if for no other reason than that it applies to the Dominion and *a fortiori* to the provinces, but it is also to be remembered that it is merely a statutory statement (and limitation) of the common law rule, that a subordinate legislature is subject to the paramount power of the power which created it.

It may be added that the interpretation of the Act of 1867 is in some degree aided by the course of legislation in the Dominion and the provinces, but neither Dominion nor province can authoritatively interpret the terms of the Act; see Lefroy, op. cit., pp. 233 seq.

Comparatively little is heard of sovereignty as regards Canada and the provinces in the cases: Gwynne J., indeed, 4 S. C. R. 215, at pp. 346, 347, declared that the Dominion Parliament alone had sovereign power, but Ritchie C. J. (ibid., pp. 238 seq.), declared that both province and Dominion had a legislative sovereignty (Lefroy, pp. 252, 253). The older cases (*Tai Sing* v. *Maguire*, (1878) 1 B. C. (Irving), at p. 108; *Reg.* v. *Wing Chong*, (1885) 2 B. C. (Irving), at pp. 161, 162; *Reg.* v. *The Gold Commissioners of Victoria District*, (1886) 2 B. C. (Irving), at p. 260), which asserted limitations on the powers of the provinces resting on implied restrictions by the operation of (non-existent) treaties, or the rule of uniform treatment of citizens, are of no weight. The statutes of the provinces, therefore, must be read as presumably valid (Lefroy, pp. 260–9). The provinces within the limit of these powers can act as they please; they are not bound by any consideration of propriety except their own judgement, and they can affect private rights as they deem desirable. The American doctrine of the

4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of *Canada*.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.

sanctity of contracts has been invoked in Canada (*The Grand Junction Railway Co.* v. *The Corporation of Peterborough*, (1883) 8 S. C. R. 86, at p. 100; *in re Clay*, (1886) 1 B. C., (Irving) at p. 306), but it was once and for all settled by the decision in *L'Union St. Jacques de Montréal* v. *Belisle*, (1874) 6 P. C. 31, where one judge of the Lower Court had quoted the doctrine (20 L. C. J. 29, at p. 38); *re Goodhue*, 19 Gr. 366; *Canadian Law Journal*, N. S., ix. 12; *Municipality of Cleveland* v. *Municipality of Melbourne*, 4 L. N. 277; *re McDowell and the Town of Palmerston*, (1892) 22 O. R. 563; *Licence Commissioners of Prince Edward County* v. *County of Prince Edward*, (1874) 26 Gr. 452; *Kelly* v. *Sullivan*, 2 P. E. I. 34; 1 S. C. R. 1. So also the Dominion can pass a retrospective taxation Act; *Attorney-General of Canada* v. *Foster*, (1892) 31 N. B. 153 (in that case there was no antecedent resolution to warn the taxed person: in *ex parte Wallace & Co.*, (1892) 13 N. S. W. L. R. 1, the Court upheld the practice of collecting new duties from the date of the resolution of the Legislative Assembly.

Partial invalidity is possible without complete rejection, if the invalidity can be separated, but not if otherwise; cf. Privy Council Report on Liquor Licence Laws of 1883–5 in 4 Cart. 342, note 2; *McKilligan* v. *Machar*, (1886) 3 M. R. 418; *Allen* v. *Hanson*, (1890) 16 Q. L. R., at p. 64; 18 S. C. R. 667, at p. 673. Moreover, limiting phrases—'so far as the legislature has power thus to enact'—are adequate to render valid dubious enactments; *Attorney-General of Canada* v. *Attorney-General of Ontario*, 20 O. R. 222, at p. 246; 19 O. A. R. 31, at p. 40; 23 S. C. R. 458, at p. 471; and cf. *re Windsor & Annapolis Railway Co.*, 4 R. & G. 312.

An Act which is invalid can impose no rights or duties, and it does not require first to be formally set aside before it is treated as a nullity; *Bourgoin* v. *Chemin de Fer de Montréal*, (1880) 5 App. Cas. 381; *Théberge* v. *Landry*, (1876) 2 App. Cas. 102; *Lenoir* v. *Ritchie*, 3 S. C. R. 575, at pp. 624, 625; and it seems to be clear law that the Court can take note of the unconstitutionality on its own initiative. *Valin* v. *Langlois*, (1879) 5 Q. L. R. 1, at p. 16, per Meredith C. J.; contra, Stuart J., in *Belanger* v. *Caron*, (1879) 5 Q. L. R., at p. 25. In some cases there may be estoppel, but the instances are not conclusive; see *Ross* v. *Guilbault*, (1881) 4 L. N. 415; *Forsyth* v. *Bury*, (1885) 15 S. C. R. 543; *McCaffrey* v. *Ball*, (1889) 34 L. C. J. 91; *Ross* v. *The Canada Agricultural Insurance Co.*, (1882) 5 L. N. 23; Lefroy, p. 260, note 1.

10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any *British* or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.[1]
23. Copyrights.
24. *Indians*, and Lands reserved for the *Indians*.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated : that is to say,—

[1] The Parliament has dealt with trade marks by 42 Vict. c. 22 ; see *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company*, [1911] A. C. 78, at p. 84 ; *Partlo.* v. *Todd*, 17 S. C. R. 196 ; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 S. C. R. 315.

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following classes :—

    a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province :

    b. Lines of Steam Ships between the Province and any *British* or Foreign Country :

    c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of *Canada* to be for the general Advantage of *Canada* or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal

Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions :—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union :

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in *Upper Canada* on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic subjects in *Quebec* : [1]

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education :

(4) In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of *Canada* may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General in Council under this Section.[2]

[1] On the school system of the province there is a very copious literature issued by the Government of Ontario in its *Sess. Pap.* annually.

[2] No such legislation has ever been passed.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

94. Notwithstanding anything in this Act, the Parliament of *Canada* may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in *Ontario, Nova Scotia*, and *New Brunswick*, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of *Canada* to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of *Canada* making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.[1]

Agriculture and Immigration

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration[2] into the Province: and it is hereby declared that the Parliament of *Canada* may from Time to Time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of *Canada*.

The expectations, if they really held them—for s. 91 (16) seems to show that they realized the prospect of conflict—of the framers of the Act have not been realized. The number of cases which have been raised and decided on the Act is almost appalling, and it is really a serious matter for consideration when the advantages of the form of federal government are considered. Indeed, the complication resulting was one of the main reasons why the framers of the Union of South Africa definitely decided to abandon any idea of having provinces in that country.

There is only one really ruling principle of interpretation which has been adopted by the Privy Council in its many

[1] This action has never been taken; see Lefroy, op. cit., pp. 315, note 1, 575, note 2.

[2] This power has been practically never successfully exercised.

most important judgements regarding these cases. It is that the *British North America Act* is to be regarded as a British statute and to be interpreted as such a statute, that is, to give all its parts their natural sense when read in conjunction, and not to limit the interpretation of the whole by any theory of federal government. It is all the more important to lay stress on this principle, because exactly the opposite principle has, as we shall see, been accepted by the High Court of Australia for the interpretation of the Commonwealth Constitution, and the majority of that Court maintain their views despite the reasoned dissent of the Privy Council in the case of *Webb* v. *Outtrim*.[1] It is characteristic that while that case has been disregarded by the majority of the High Court of the Commonwealth it has been followed in Canada, and has been used to upset the decisions often repeated in the Ontario Courts,[2] and, by a curious irony of fate, quoted by the Chief Justice of the Commonwealth as being an accepted part of the law of Canada, that no municipal or provincial authority could tax the salary of a federal officer, as that would be to interfere with a federal instrumentality, a course forbidden, not indeed by the express terms of the Act, but by the nature of a federation. But a federation which has a rigid constitution and is a sovereign power must be interpreted in a very different way from one which is a dependency, and in which, moreover, the federal government possesses what the federal power in the United States has not—the power of disallowing the Acts of the provinces. It is true that the Commonwealth Court has recognized the latter difference, and used that as their justification for disregarding the cases decided as regards Canada, on the ground that the Commonwealth

[1] [1907] A. C. 81, dissenting from *D'Emden* v. *Pedder*, 1 C. L. R. 91, and *Deakin* v. *Webb*, 1 C. L. R. 585. For the rejection of the Privy Council's view, see 4 C. L. R. 1087; below, pp. 824 seq. For the general principles of interpretation, see Lefroy, *Legislative Power in Canada*, pp. 21 seq.

[2] *Leprohon* v. *City of Ottawa*, 40 U. C. Q. B. 478; 2 O. A. R. 522. As Lefroy, p. 671, pointed out, it was inconsistent with *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, and the Supreme Court reversed it in *Abbott* v. *City of St. John*, 40 S. C. R. 597. See also Lefroy, pp. xliii–lxx.

cannot disallow state laws : the obvious answer is that it can ask the Imperial Government to do so, and that Government would have no hesitation in doing so if the Act violated in any way the Imperial compact.

The principle determining the whole matter was indeed clearly laid down by the Privy Council in the case of *Bank of Toronto* v. *Lambe*,[1] in which it was held by the Privy Council that the Legislature of Quebec has power to impose a direct tax, under s. 91 (2) of the *British North America Act*, on incorporated companies doing business in the province. The argument was there raised that the tax might be so heavy that it would defeat the Dominion power to incorporate companies at all, and such arguments had been used successfully in the United States Courts. The Privy Council dismissed it as beside the mark :—

People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes : they have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution under which no one of the parts can make law for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether one body or the other has power to make a given law. If they find that on the due consideration of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament.[2]

The problem, then, is how to give each section a fair meaning, and neither to aggrandize the Dominion at the cost of the provinces, nor to make the Dominion helpless to carry out its fundamental purposes. A few examples will illustrate the main lines of solution.

[1] 12 App. Cas. 575, followed in *Fortier* v. *Lambe*, 25 S. C. R. 422. This case was cited with approval in *Peterswald* v. *Bartley*, 1 C. L. R. 497, and distinguished in *Deakin* v. *Webb*, 1 C. L. R. 585.

[2] Cf. *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A. C. 437, at pp. 441–3.

(*a*) *Election Petitions*

Thus it was held in *Valin* v. *Langlois*,[1] by the Supreme Court of Canada, that though the power to legislate for the constitution of civil Courts and procedure in the provinces is exclusively provincial, the Dominion Parliament could impose on the superior Courts of the provinces the duty of trying election petitions, and the Privy Council were unwilling even to give leave to appeal[2] from the decision, partly on the ground, which led to the later decision that the Privy Council will not hear electoral appeals from even the Supreme Court, viz. the disadvantage to the province and Dominion of delay in settling such a case.[3]

(*b*) *The Temporalities Fund*

In the case of the question of the temporalities fund of the Scottish Church in Canada, in part a reminiscence of the old church lands, the Quebec Legislature endeavoured to repeal an Act of the old united province, but the attempt was held void on the ground that only the Canadian Federal Legislature could effect such a repeal, and that it was an attempt to alter substantially the class of persons interested in the corporate funds, and not merely to limit the operations of a corporation carrying on business in the province.[4] On the other hand, the Alberta Legislature could regulate the medical practice in Alberta, though the College of Physicians and Surgeons of the North-West Territories had not been dissolved under s. 16 (3) of the *Alberta Act* (4 & 5 Edw. VII. c. 3).[5]

(*c*) *The Liquor Traffic*

The liquor question has given rise to particularly intricate troubles, and in this case the matter has been rendered more difficult by the angry feelings liquor questions have

[1] 3 S. C. R. 1, on appeal from Quebec, 5 Q. L. R. 1.
[2] 5 App. Cas. 115.
[3] Glengarry case, *Kennedy* v. *Purcell*, July 7, 1888. See 14 S. C. R. 453.
[4] *Dobie* v. *The Temporalities Board*, 7 App. Cas. 136.
[5] *Lafferty* v. *Lincoln*, 38 S. C. R. 620.

always excited in Canada as elsewhere.[1] In 1874 Ontario legislated (c. 32) to provide that a licence was needed under the Act to authorize the sale of liquor in the province. This Act was declared *ultra vires* by the Supreme Court of Canada :[2] they denied that it was direct taxation, and they thought it was fundamentally different from the power to impose licence duties on shops, saloons, taverns, &c., given to the provinces by s. 92 (9), and that it infringed on the power of Canada to regulate commerce. In 1897 the decision was reversed in *The Brewers' and Maltsters' Association case*,[3] where the Privy Council held that similar licence duties on brewers were a direct tax authorized by s. 92 (2), and that in any case their imposition was a legitimate exercise of the power to impose licence duties, and therefore valid under s. 92 (9).

In 1878 (41 Vict. c. 16) the Dominion Parliament legislated to encourage temperance : if the Act is brought into force in any county or town in the Dominion, it becomes illegal to sell intoxicating liquors except wholesale or for certain limited purposes, and in the excepted cases the sale is strictly regulated, sales in violation of the law are criminal, and for the third offence and any subsequent one imprisonment is legitimate. The Act was declared *ultra vires* in the *City of Fredericton* case by a New Brunswick Court in 1879,[4] but was approved by the Supreme Court[5] and the Judicial Committee, which showed that as it did not raise revenue it could not fall under s. 92 (9) of the *British North America Act*, and that it was really a regulation similar to a regulation for the prevention of the use of noxious poison, being thus for order and good government, but not an exercise of any specified power such as the trade and commerce power under s. 91 (2), as Ritchie C. J. held in the Supreme Court. This

[1] See, besides Wheeler and Lefroy, Quick and Garran, *Constitution of Commonwealth*, pp. 544 seq.

[2] *Severn* v. *The Queen* (1877), 2 S. C. R. 70. Cf. *Reg.* v. *Justices of King's County*, 2 Pugs. 535, a decision on the New Brunswick Act, 36 Vict. c. 10. See on the whole question, Wheeler, *Confederation Law of Canada*, pp. 144 seq., 1042 seq. ; Lefroy, op. cit., pp. 372 seq., 401 seq.

[3] [1897] A. C. 231. [4] (1879) 3 P. & B. 139. [5] 3 S. C. R. 505.

point was left unsettled in *Russell* v. *The Queen*,[1] but decided definitely in 1896.[2] Moreover, the measure was not merely local: it might be applied only in a certain locality, but its aim was general, and not limited to one part of Canada so as to be purely local legislation, which is reserved by s. 92 (16) to the provinces. This decision led to the passing of the Federal Act of 1883 (46 Vict. c. 30), which provided a general licensing system throughout the Dominion. But this Act was not destined to pass unchallenged, for in the case of *Hodge* v. *The Queen*[3] it was held by the Privy Council that it was perfectly within the power of the Ontario Legislature to enact provisions for the licensing of taverns and the regulation of licensed premises, and as a consequence the Canadian Parliament referred under the provisions of an Act of 1885 the construction and validity of the Act of 1883 and an amending Act of 1884 (47 Vict. c. 32) to the Supreme Court and Privy Council, which declared them *ultra vires* except so far as they were merely ancillary to the Act of 1878, and except perhaps so far as they dealt with wholesale and 'vessel' licences.[4] The ground seems to have been that the Acts regulated the trade as a municipal matter and made the net proceeds payable to the municipalities.

In 1893 the Supreme Court were asked to advise as to whether the provinces could prohibit the sale of liquor, or its manufacture, or its importation. It was also asked whether the sale could be prohibited in such parts of the province in which the Canada Temperance Act was not in operation, and they were asked to say if sale in retail could be forbidden if wholesale sale could not be forbidden, especially with regard to an Ontario Act passed in 1890 (53 Vict. c. 56), and explained by one passed in the following year. The Supreme Court[5]

[1] *Russell* v. *The Queen*, (1882) 7 App. Cas. 829; see also a list of the cases in Canada *Sess. Pap.*, 1883, No. 80; 5 Cart. 663, 664, 668, 669.

[2] *Attorney-General for Ontario* v. *Attorney-General for the Dominion and Brewers' Association of Ontario*, [1896] A. C. 348.

[3] 9 App. Cas. 117; *Sulte* v. *City of Three Rivers*, 11 S. C. R. 25.

[4] See 48 & 49 Vict. c. 74; Lefroy, pp. 383, 403; Canada *Sess. Pap.*, 1885, No. 85; 4 Cart. 342, note 2.

[5] 24 S. C. R. 170.

was much divided in opinion ; three judges out of five held that the provinces had none of the powers suggested, but two thought that they had all except the power to prohibit manufacture and importation. The Judicial Committee [1] held that the Act of Ontario was valid except in the parts of the province where the Canada Temperance Act might come into force. They doubted whether the province could ever prohibit the importation of liquor, but it might perhaps forbid the manufacture, if that could be treated as a provincial matter. They laid down, however, a great principle as governing the case, viz. that while the Federal Parliament has a general legislative power over Canada in addition to the express authority given in s. 91 by specification, the general authority must not trespass on the subjects within the exclusive powers of the provinces under s. 92, while in the case of the powers given under s. 91 specifically they could be exercised, though incidentally they interfered with the exclusive powers of the provinces : they thought such interference was due not to any direct collision of powers, but to the fact that a thing might be looked at from different points of view. The Canada Act was not a regulation of trade and commerce, for it aimed at destroying trade and commerce, but was valid under the general power given by s. 91. The result of the decision has certainly been to leave the subject in a profound state of confusion, and the petitions of the English provinces for prohibition by the Parliament have hitherto been neutralized by the obstinate objections of Quebec, which is the support of the Prime Minister.[2] A Manitoba Act of 1900 (c. 22) regulating the traffic, which the Provincial Court of King's Bench pronounced *ultra vires*, has been held *intra vires*, though interfering with the Dominion revenue and indirectly with business relations outside the province, as dealing with a local matter.[3] A referendum

[1] 19 L. N. 139 ; [1896] A. C. 348 ; Wheeler, pp. 1042 seq., gives a verbatim account of the proceedings.

[2] Canada *House of Commons Debates*, 1899, i. 95.

[3] *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A. C. 73.

taken under a Dominion Act, 61 Vict. c. 51, was adverse to prohibition, for there was only a majority of 14,000 in a total vote of 543,049, though Ontario, Nova Scotia, Prince Edward Island, and Manitoba in separate referenda returned decided majorities.

(*d*) *Fisheries*

The subject of fisheries has also raised perplexing problems. In 1868 the Minister of Marine and Fisheries was authorized to grant licences for fishing, and he did so in respect of certain non-tidal waters in New Brunswick. The Supreme Court of Canada [1] decided that the property in the fishery was a provincial matter merely, and that the Dominion could only regulate generally the fishing, and could grant licences only in cases where the land was that of the Dominion. It has also been held that the land in harbours is the property of the Dominion, and so the harbour fisheries belong to them.[2] The Judicial Committee has quite clearly held that whatever proprietary rights were vested in the provinces at the date of the *British North America Act* remained so vested unless expressly transferred to the Dominion Government. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of these proprietary rights. The Committee also held that the powers of the Dominion over fisheries extended to doing anything except vest the proprietary rights in other than their true owners, and that both the Federal and Provincial Legislatures could impose licence duties on fishing. They also held that an Ontario Act to regulate the fisheries was *ultra vires*, and they meted out the same fate to a Federal Act to empower the grant of exclusive fishing licences in rivers or over provincial property. Moreover, they held that the public harbours were transferred to the Dominion together with all naturally understood by that term. They pronounced *intra vires* an Act (*Revised Statutes*, c. 24, s. 47) authorizing the Government of Ontario to appropriate land

[1] *The Queen* v. *Robertson*, 6 S. C. R. 52; cf. 26 S. C. R. 444; Quick and Garran, *Constitution of Commonwealth*, pp. 568, 569.

[2] *Holman* v. *Green*, 6 S. C. R. 707.

covered with waters other than in the case of waters forming parts of harbours or canals: the Act itself forbade interference by such sales with navigation or the use of harbours. Again, the provincial legislatures are the proper authorities to regulate the form of conveyance of fishery rights. The provinces also can deal with, by regulations as to lease or sale, their own rights in the fisheries in virtue of their ungranted public lands. Such legislation really deals with property, and does not come within the term fisheries in s. 91. But again, the Federal Parliament could pass an Act regulating works constructed in or over navigable waters, for the Act clearly related to matters of navigation.[1] As a result of this decision, Ontario and Quebec issued licences to regulate the valuable fisheries in their inland waters.[2] It may be added that the Canada Courts held that there is no private property in the beds of the great lakes or great navigable rivers, and the Australian High Court has applied this to a salt lagoon.

(*e*) *Escheats*

Another series of cases arose from the idea that the prerogative could not be affected by anything less than the Federal Parliament, as the provinces were not in any way connected with the Crown, but were merely like municipal bodies. Thus in 1874 the Governor-General in Council disallowed an Act of Ontario regarding escheats. The reasons all come to the same thing, that the Lieutenant-Governor could not assent in the royal name to an Act, that it was a matter of prerogative, and that the province had nothing to do with prerogative.[3] In 1876 it was judicially held in

[1] *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario*, &c., 26 S. C. R. 444; [1898] A. C. 700; as to great lakes, see 26 S. C. R., at pp. 520 seq.; lagoons, *Williams* v. *Booth*, 10 C. L. R. 342. See for the earlier cases, Wheeler, pp. 72 seq.; *The Queen* v. *Moss*, 26 S. C. R. 322 (property in bed of navigable rivers is in the provinces); *Wyatt* v. *Attorney-General of Quebec*, [1911] A. C. 489.

[2] Canada *House of Commons Debates*, 1899, ii. 2910, 2911; the matter still presents difficulties; see *Provincial Legislation*, 1899–1900, pp. 46, 47, 57 seq.; 1901–3, pp. 59–61; *House of Commons Debates*, 1910–1, pp. 6778 seq.

[3] Canada *Sess. Pap.*, 1877, No. 89, pp. 88 seq. The Act was 37 Vict. c. 8. The position is still different as regards Manitoba, where an Act, 47 Vict.

Quebec that escheats belonged to the province, and it was then agreed that ordinary escheats should go to the province and escheats in cases of treason, felony, &c., to the Dominion.[1] Then Ontario legislated, and the Act was questioned in 1878 in the case of the property of one Andrew Mercer, who had died intestate. The claim of the Government was made good in the Courts of the province, and then the Supreme Court decided in favour of the Dominion.[2] This decision was reversed by the Judicial Committee,[3] who held, from s. 109 of the Constitution, that the escheats belonged to the province, as that section provides for leaving to the province lands, mines, minerals, and royalties, and the term royalties would cover the case. This section they held to include all the ordinary territorial revenue of the Crown.[4]

(*f*) *Pardon and Precedence*

The same curious view about the inability of the provinces to touch cases affecting the prerogative is seen in the attempts to show that the provinces could not give the Lieutenant-Governors the power of pardon, which was at last negatived by the Supreme Court,[5] though merely on technical grounds, after the Judicial Committee [6] had admitted the power of the laws of Quebec to deprive the Crown of the right to priority in the winding up of the affairs of an insolvent.

c. 26, was disallowed; see *Provincial Legislation*, 1867–95, pp. 838, 839. The lands there are still Dominion lands (except the swamp lands), and so in Saskatchewan and Alberta; they are provided for by a Dominion Act 9 & 10 Edw. VII. c. 18. Cf. as to inability of provinces to affect prerogative, Lefroy, op. cit., pp. 174 seq.

[1] Canada *Sess. Pap.*, 1877, No. 89, pp. 88–105; *Attorney-General of Quebec* v. *Attorney-General of Canada*, (1876) 1 Q. L. R. 177; 2 Q. L. R. 236. In *Dumphy* v. *Kehoe*, (1891) 21 R. L. 119, it was held that the goods of a felon belong to the province, not to the Dominion. Customs forfeitures belong to the Dominion according to 2 Q. L. R. at p. 241; Lefroy, p. 616.

[2] 5 S. C. R. 538. [3] 8 App. Cas. 767.

[4] Hence Quebec legislated by 48 Vict. c. 10; New Brunswick in 1877, c. 9; Nova Scotia in *Rev. Stat.*, 1900, c. 127, &c. See also the Dominion Act of 1910 for Alberta, Saskatchewan, and the Manitoba crown lands.

[5] 23 S. C. R. 458; see 19 O. A. R. 31; 20 O. R. 222.

[6] [1892] A. C. 437.

Moreover, after many years, the Judicial Committee [1] upset at last the absurd idea that the power of appointing Queen's Counsel was one only to be used by the Governor-General. In all these cases it is important to note that the decision of the Privy Council at once restored the just equilibrium of the powers of the several factors in the constitution : the power of the Governor-General to pardon is to pardon offences against Dominion laws and offences which can be tried by Colonial Courts by virtue of Imperial Acts. That he should have pardoned persons who were not convicted of more than breaches of provincial regulations would have been indeed unwise. Similarly it is for the Governor-General to determine precedence in Dominion Courts, and for the provincial authorities to do so as regards Provincial Courts. Thus in 1907 the new provinces, Saskatchewan (c. 21) and Alberta (c. 20), arranged for the appointment of King's Counsel and the grant of precedence.

(*g*) *Ferries*

The question of the Dominion control over ferries may conveniently be considered in this connexion. The power given under s. 91 (13) is power with regard to ferries between a province and any British or foreign country, or between two provinces, and the nature and extent of this power was considered elaborately by the Supreme Court on a reference by the Governor-General in Council *in re Inter-Provincial and International Ferries*.[2] It was contended for the Province of Ontario that the jurisdiction with regard to ferries conferred upon the Dominion was merely the power of the regulation of ferries when they had been granted by provincial authorities, and it was contended that under s. 109 of the *British North America Act* the proprietary right in ferries and the royal prerogative to grant a ferry were vested in the

[1] *The Attorney-General for the Dominion of Canada* v. *The Attorney-General for the Province of Ontario*, [1898] A. C. 247 ; 23 O. A. R. 792.

[2] 36 S. C. R. 206, overruling *Perry* v. *Clergue*, 5 O. R. 357. Non-inter-provincial or international ferries fall within the jurisdiction of the provinces, under s. 92 (16), and perhaps s. 92 (2) ; see *Dinner* v. *Humberstone*, (1896) 26 S. C. R. 252, at pp. 266, 267.

provincial governments and not in the Dominion Government.

This view was supported by arguments drawn from the case of escheats,[1] from the case of fisheries,[2] and from the case of railway lands in British Columbia,[3] and it was held that just as the Dominion had no proprietary right in the fisheries in the territorial waters of the provinces, and had not a proprietary right in the minerals under railway lands of British Columbia, so also it had no proprietary right with regard to ferries. But the Supreme Court of Canada decided definitely that the right to grant a ferry now belonged to the Dominion Government, that it was included within the legislative power as to ferries, and they evidently considered that the prerogative to grant a ferry was one which had fallen out of use.

It may be added that it has actually been held in South Australia[4] that a Governor has not without express delegation any power to grant a ferry, and in any case it is clear that the prerogative is not a living one at the present day.

(*h*) *Lands in British Columbia*

In *McGregor* v. *Esquimalt and Nanaimo Railway Co.*[5] the question was raised as to the railway lands in British Columbia granted under the terms of union of the province by Act 47 Vict. c. 14. The Dominion had granted certain lands to the company, and subsequently to the grant the Legislature of British Columbia passed an Act (3 & 4 Edw. VII. c. 54) under which certain original settlers were given rights over those parts of the lands included in the Dominion grant. The Act was allowed to stand by the Dominion Government,[6] but was challenged in the Courts, and the Privy Council

[1] *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767.

[2] *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario*, &c., [1898] A. C. 700; 26 S. C. R. 444.

[3] *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295.

[4] *Dewar* v. *Smith*, 1900 S. A. L. R. 38.

[5] [1907] A. C. 462.

[6] *Provincial Legislation*, 1904–6, pp. 125, 126. Sir C. Fitzpatrick very inaccurately foresaw the decision of the case.

declared in favour of its validity. The grant of lands was an act of the provincial legislature which it could vary by legislation, as it had done, and the power was in no way contrary to the power of the Dominion over railways. So also, as mentioned above, it was held that the precious minerals under the lands granted to the Dominion by the terms of union did not pass at all to the Dominion, but remained vested in the province, the effect of the transfer being to give to the Dominion the right of appropriation of the revenues arising from the land, not a transfer of the land in full proprietary ownership.[1] But an attempt to extend the claim to the water rights over the land has failed both in the Supreme Court and in the Privy Council,[2] and it has been held that grant of the land must be by the Dominion patents.[3] In the water rights case the Privy Council were clear that the power to manage the lands was vested exclusively in the Dominion under s. 91 of the Act: otherwise the province could by legislation make null and void their own grant to the Dominion, and lessen or take away altogether its value, and they held that the Provincial *Water Clauses Consolidation Act* (*Rev. Stat.*, 1897, c. 190) by s. 2 expressly excluded such lands from the operation of the law under which the Provincial Government purported to act.

(*i*) *Indian Lands*

Troublesome questions have been raised about the rights of the Indians to the lands. In 1763 the royal proclamation provided that unoccupied lands should be reserved for the present for Indians, and forbade acquisition of such lands otherwise than through the Governor. In 1873 certain lands in Ontario occupied by Indians were surrendered by them to the Dominion, subject to certain rights of hunting and fishing. The Dominion claimed that, having got the lands on a good title, they alone could grant licences for cutting wood, and

[1] *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295; see [1911] A. C. 87, at pp. 94, 95.

[2] *Burrard Power Co.* v. *The King*, 43 S. C. R. 27; [1911] A. C. 87.

[3] *The Queen* v. *Farwell*, (1893–4) 3 Ex. C. R. 171, at p. 289; 22 S. C. R. 553, at p. 561.

so forth, in these lands, and that they were entitled to the proceeds. On the part of Ontario it was contended that the right in these lands was always in the Crown, not in the Indians : that being in the province, the lands passed to the province under s. 109 of the Constitution, and the only power which the Dominion could have would be a power of legislation in respect of the lands under the powers to legislate in s. 91. It was decided by the majority of the Supreme Court[1] that the lands formed part of the public domain and were the property of Ontario. They insisted on the fact that the French Crown claimed in full propriety all the lands in the country, and ceded them in full propriety to the English Crown in 1763. The claims of the Indians were always under the French, and still were, claims to benevolent consideration, but not legal claims to be enforced by the Courts. This decision was in effect upheld by the Judicial Committee,[2] who also held that the Indians had no title, but were allowed a fructuary use of the lands, and that the timber on the land was wholly vested in the Crown. Moreover the Judicial Committee then decided that the lands were not burdened with any trust or other compulsion to pay the Indians sums out of them, but they held that with the lands the province must relieve the Crown and the Dominion of the burden of all promises made to the Indians and in part fulfilled by the Dominion, though the remark is apparently only an *obiter dictum* and does not mean a legal obligation, and of course the actual hunting, &c., rights morally bound the province.

In the case of *The Dominion of Canada* v. *The Province of Ontario*,[3] decided on July 29, 1910, the question was raised

[1] 13 S. C. R. 577. Cf. Boyd C. in 10 O. R. 196.

[2] *St. Catherine's Milling and Lumber Co.* v. *Reg.*, 14 App. Cas. 46 ; 13 S. C. R. 577 ; 13 O. A. R. 148 ; Lefroy, pp. 612–4. See also *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73. As to the annuities see also *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199 ; 25 S. C. R. 434.

[3] [1910] A. C. 637, affirming the decision in 42 S. C. R. 1, where Idington, Maclennan, and Duff JJ. agreed, Girouard and Davies JJ. dissenting. Cf. the valuable correspondence in Ontario *Sess. Pap.*, 1908, No. 71. Since

whether the Dominion of Canada was entitled to recover from the province a proper proportion of annuities and other moneys which the Dominion undertook in the name of the Crown to pay to an Indian chief under a treaty of October 3, 1873. The case was decided in the first instance in the Exchequer Court of Canada in favour of the Dominion, but in the Supreme Court of Canada three out of five judges reversed the decision. Under the treaty the Indian interest was extinguished by consent over 50,000 square miles, and in return certain payments and other rights were agreed to and promised. At that time it was not certain whether any part of the land was included within the Province of Ontario, but when the appeal was brought it had long been decided that the land was part of the province. In making the treaty the Dominion Government acted upon the rights given under the constitution, not in concert with the Ontario Government but on their own responsibility, and their motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole. When, however, it was established by decision subsequent to 1873 that by the release of the Indian interest the lands enured to the benefit, not of the Dominion, but of the province, it became clear that Ontario had derived an advantage under the treaty, and the object of the appeal was to secure the making good by Ontario to the Dominion of so much of the burden incumbent on the Dominion as might properly be attributed to the lands within Ontario which had been disencumbered of the Indian interest by virtue of the treaty.

In deciding the case the Judicial Committee stated that for the Dominion to win its case they must bring it within some admitted legal principle, and though the Exchequer Court of Canada, by statutes both of the Dominion and the province, had jurisdiction to hear the case, it was not entitled to dispose of it on any but proper legal grounds. It might be that in questions between a Dominion which included provinces with varying legal systems, and a particular

1894 dealings as to native lands have been conducted on the basis of agreement with Ontario. See [1903] A. C. 73, at p. 83.

province with laws of its own, difficulty might arise as to the legal principle to be applied, but the conflict was between one set of legal principles and another, and in the present case it did not appear to their lordships that the claim of the Dominion could be sustained on any principle of law which could be held to be applicable. The case ought to be regarded as if what had been done by the Crown in 1873 had been done by the Dominion Government, as it was in fact done. The Crown acted on the advice of ministers in making treaties, and in owning public lands held them for the good of the community. When differences arose between the two Governments in regard to what was due to the Crown as maker of treaties from the Crown as owner of public lands, they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty-maker and as owner respectively. So regarding it, there did not seem sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted in great national interests in pursuance of the powers given by the Act of 1867 without the consent of the province and in the belief that the lands were not part of the province. As guardians of the Indian interest empowered to accept a surrender and to give equivalents, they had no special duty to the province, and in regard to the proprietary rights in the lands apart from the Indian interest which enured to the benefit of the province, they had no share in it at all. The only thing in regard to which the Dominion could conceivably be thought trustees for the province, namely the dealing with the Indian interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Canadian Government was not that of trustees, but that of ministers exercising their powers and their discretion for the public welfare.

They also declined to accept the argument that the case was analogous to that of a purchaser of real estate who pays money to discharge an existing encumbrance upon it without notice of an infirmity in his title. The Dominion Government were never purchasers of the lands; they had notice

of the claim of the true owner, and they paid over the encumbrance not for the benefit of the land but for distinct and important interests of their own. It was really a case where expenditure by one party for his own interests had benefited the other, and it might be, as a matter of fair play, that the province ought to be liable for some part, but in point of law it was not so liable. They recognized that the opinion of the dissenting judges in the Supreme Court was due to a passage delivered by Lord Watson in the case of *St. Catherine's Milling and Lumber Company* v. *The Queen*.[1] This passage did indeed give strong support to the views based upon it, but they considered that Idington and Duff JJ. had stated conclusive reasons against accepting the dictum as decisive of the case. The point raised was neither raised nor argued in that case, and it was quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so the passage must be regarded as *obiter dictum*. In the course of the argument a question was mooted as to the liability of the Provincial Government to carry out the provisions of the treaty as regards future reservations for the benefit of the Indians, but the question was not decided by the Judicial Committee, and the matter is still being discussed between the Ontario and the Dominion Governments.[2]

(*j*) *Debt Liability*

The provisions of ss. 111 and 112 of the British North America Act with regard to the liability of the provinces to the Dominion in respect of their debts have been frequently discussed. The Provinces of Ontario and Quebec were to

[1] 14 App. Cas. 46, at p. 60. See also 25 S. C. R. 434, at p. 505. Cf. Lefroy, op. cit., p. 594, note. Once the title is extinguished the lands become subject to ordinary law; e.g. *Church* v. *Fenton*, 28 U. C. C. P. 384; 4 O. A. R. 159; 5 S. C. R. 239. While the Indians are entitled to rents, it is for the Dominion Government to sue for them as being entrusted with the control of Indian affairs; *Mowat* v. *Casgrain*, January 20, 1896, cited in Lefroy, loc. cit.

[2] In the case of *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73, it was held that a grant by the Dominion to Indians of lands as reserves was a mere nullity, except by legislative sanction of the province; see 54 Vict. c. 3 (Ontario); 54 & 55 Vict. c. 5 (Dominion).

be liable for the balance, over $62,500,000, of their whole debts and liabilities which were assumed by the Dominion. In the case of *The Attorney-General for Canada* v. *The Attorney-General for Ontario*[1] it was held that the two provinces were bound to repay certain annuities payable to the Ojibeway Indians under the Huron and Superior treaties, as had been decided by the arbitrators in their award of January 7, 1896, and also the advanced annuities payable under the agreement. This case was followed by the Supreme Court of Canada in *The Province of Quebec* v. *The Dominion of Canada*,[2] which agreed that the lands were not, as the Dominion was anxious like Quebec to hold, burdened with a trust or interest in favour of the Indians which imposed on Ontario alone the payment of the annuities. Quebec also argued that a contingent liability was not intended to be borne by the provinces, but only by the Dominion.

In *The Queen* v. *Yule*[3] the matter arose out of a toll-bridge erected in Quebec in 1845 under an Act of Canada, 8 Vict. c. 90, on the basis that in fifty years it should revert to the province, which was to pay the value of the bridge to the representatives of the proprietors. The Exchequer Court[4] held, and the Supreme Court concurred, that there was no lien or right of retention charged upon the property—and therefore payable by Quebec—but that the amount due was a liability—though only contingent in 1867, of the Provinces of Canada, which fell upon the Dominion Government subject to reimbursement by Ontario and Quebec.

(*k*) *Immigration*

The question of immigration legislation is one which has caused some doubt : the Dominion Government, as will be seen, has on grounds of public policy disallowed a good many Provincial Acts, but it has also doubted whether it was really within the legislative powers of the Parliament to pass an Act dealing with such a question as Asiatic immigra-

[1] [1897] A. C. 199 ; 25 S. C. R. 434 ; Lefroy, op. cit., pp. 612–4.
[2] (1898) 30 S. C. R. 151.
[3] (1899) 30 S. C. R. 24.
[4] 6 Ex. C. R. 103.

tion: on this matter the Imperial Government expressly declined to give any opinion when the question was mentioned by the Dominion Government.[1] The end of the whole matter has been, however, that in 1908 the Courts of British Columbia[2] decided that the Provincial Act of that year against Asiatic immigration was invalid as regards Japanese because it contravened the provisions of the Act of 1907 (6 & 7 Edw. VII. c. 50), by which the Parliament of Canada ratified the adherence of Canada to the treaty with Japan of 1894 under the special protocol negotiated for the Dominion by the Imperial Government, and which allowed the Japanese free entrance into Canada, and as regards all other Asiatics because it was not consistent with the requirement of the law of Canada regarding immigration that under certain circumstances every immigrant who had not been rejected by the medical inspector for the Dominion should be allowed to land. This provision is not indeed one which was framed with any intention of it regulating the question of Oriental immigration: it seems to have been intended to prevent the occurrence of cases of detention for improper purposes by captains of vessels, and it is satisfactory that it should have incidentally served so useful a purpose. It is very doubtful, in view of this decision, whether much useful purpose will ever be served by a province attempting to legislate regarding the question of immigration. Normally legislation restricting immigration has been simply disallowed, as being contrary to Dominion policy, and in any case possibly invalid.

(*l*) *Education*

Education, on which the provinces have certain exclusive powers, but subject to definite restrictions, has formed a subject of great difficulty because of the vexed question of

[1] Lord Derby, May 31, 1884; Lefroy, op. cit., pp. 258, 259, 460, note 2. *Provincial Legislation*, 1867–95, pp. 1092–4. As to immigration of paupers see Sir J. Thompson, ibid., pp. 634, 635.

[2] *Canadian Annual Review*, 1908, p. 541; *in re Nakane and Okazake*, 13 B. C. 370; *in re Behari Lal et al.*, 13 B. C. 415.

Roman Catholic rights in the Protestant provinces. In the case of New Brunswick in 1871 there arose the question whether the legislation of that year with regard to schools had not infringed upon a privilege of the Roman Catholic minority enjoyed at federation. It was decided in 1871 by the Supreme Court of New Brunswick,[1] in *Maher* v. *Town of Portland*, that it had not, and after various efforts to obtain the disallowance of certain Acts the law officers of the Crown advised that the Act was *intra vires*;[2] this view was confirmed by the decision of the Privy Council in 1873 in the long unreported case of *ex parte Maher*,[3] dismissing the appeal from the subordinate Court without even calling upon the province to show cause. In March 1875 the Dominion House of Commons, as the Dominion Government had no chance of securing the disallowance of the law, the available year having expired, addressed the Crown in favour of a modification of the law through the royal influence. The Crown, however, by a dispatch from Lord Carnarvon of October 18, 1875, pointed out that while, as the address admitted, the passing of an Act to affect the provincial law would be unconstitutional, as the matter was one of local interest, the attempt to exercise the royal authority by way of an appeal to the province to amend the law would also be unconstitutional, and there the matter ended, as New Brunswick stuck to its decision not to establish separate schools.[4]

The same troubles arose in 1877 over the Prince Edward Island legislation regarding public schools. After an unavailing effort to have the Bill reserved by the Lieutenant-Governor, the Roman Catholic minority petitioned the Government at Ottawa to disallow the Act, while the Provincial Government insisted that the Act was entirely within

[1] 1 Pugs. 73; Wheeler, pp. 334 seq. See 2 Cart. 445. The Act was 34 Vict. c. 21, repealing 21 Vict. c. 9.

[2] Canada *Sess. Pap.* 1877, No. 89, pp. 343-428; *Provincial Legislation*, 1867–95, pp. 661 seq.

[3] *Times*, July 18, 1874, p. 11; now reported at length in Wheeler.

[4] Canada *Sess. Pap.*, 1877, No. 89, p. 434; for the present state, which is a compromise, see Hannay, *New Brunswick*, ii. 293-317, 362-5.

their powers, and that disallowance would be completely contrary to the rights of the province. The Dominion Minister of Justice, however, recognized that the Act did not trench upon the legal rights of the Roman Catholics, and that though, by practice, in schools, which were legally undenominational, unauthorized textbooks had been introduced by Catholic teachers, still no legal right had been established, and the validity of the Act or the power of the Dominion to accord remedial measures never got into the Courts.[1]

But in Manitoba the case was very different, and its importance may be gauged by the fact that it cost the Federal Ministry of the day the victory at the general election of 1896, their opponents going to the country on the cry of provincial rights. In 1870, when Manitoba was formed into a province of the Dominion, there had been no legally established system of education in the country at all; there were only denominational schools supported by the denominations to which they belonged. It was therefore provided in the Act (33 Vict. c. 3, s. 22) constituting the province that the provincial powers should in education matters be placed upon the same basis as in the *British North America Act*, but safeguarding the rights possessed at union by practice as well as those by law. Moreover, in accordance with the same policy the French language was given an official status as in the Dominion Parliament and in Quebec, but in 1890 this legislation was reversed by the Provincial Parliament.[2]

In 1871 the situation as regards the schools was changed by the passing of legislation under which an Education Department was set up, half Protestant and half Catholic, and funds were allocated in equal proportions to the Roman Catholics and to other denominations for the support of their schools, while in each district the denominations could have separate schools to which alone they contributed.

[1] Prince Edward Island *House of Assembly Journals*, 1878, p. 2 and App. A; *Provincial Legislation*, 1867–95, pp. 1184–99.

[2] In 1891 the North-West Territories were allowed to follow suit, if it were considered desirable; see *Canadian Annual Review*, 1905, p 105.

Subsequent legislation altered the composition of the board, and the proportion of the grants was changed to accord with the number of children under the charge of the denominations, but the principle was maintained down to 1890 that state aid was given to denominational schools, and that each denomination was entitled to conduct its own schools in the way it thought best.[1] In 1890 the whole position was changed by the enactment of legislation, cc. 37 and 38, under which a system of non-denominational schools was set up. The Roman Catholics thus lost the right to maintain their own schools, and to receive public assistance, and their exemption from paying for the maintenance of non-Catholic schools. The action taken was naturally much resented by the Roman Catholics of the province, and efforts were made to secure the disallowance of the Acts by which the new system was brought into force, but these efforts were unsuccessful, the Dominion Government holding that if the Acts were upheld as constitutional, nevertheless there would be possible an appeal to the Dominion Parliament for remedial legislation.

The Manitoba Act of 1870 followed generally, as regards religious education, the principles of the *British North America Act*, s. 93, but varied them slightly. In the first place, the restriction on the power of the Legislature to make laws in regard to education was not merely a restriction affecting any right or privilege with respect to denominational schools existing by law at the union, but applied also to any right or privilege existing by practice. An appeal was to lie to the Governor in Council from any Act or decision of the Legislature, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education, and if any provincial law which the Governor-General in Council thought requisite for the due execution of the provisions of the section was not made, then in so far as the circumstances of the case might require the Parliament of Canada might make remedial laws. The questions there-

[1] See Sir J. Thompson's report in *Provincial Legislation*, 1867–95, pp. 947 seq.

fore arose whether the legislation in question actually affected any right existing by law or practice at the time of union, and in the second place, what was the effect of the right to appeal to the Governor-General in Council. In particular, did the right of appeal lie when a privilege or right had been given to denominational schools after union, although it did not exist at the beginning? In the corresponding section of the *British North America Act* the wording of the clause was explicitly to show that if separate schools were established after union, then an appeal lay if the privileges so conferred were later on changed. But this was not the case in the Manitoba Act.

The Roman Catholic minority protested, and the Dominion Parliament, which was then in the hands of the Conservatives, supported the protest with much energy. The first appeal to the Privy Council[1] resulted in a defeat for the minority: they went to that body on the subject whether the Act of 1890 did not contravene the first subsection of s. 22 of the Provincial Constitution,[2] which forbade a provincial law to infringe any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the time of union (the last words being a rather comic adaptation of a word applicable only to the original four provinces and other independent provinces). The Privy Council held that there was no grievance, as the only privilege which the minority had in 1870 was that of paying for the education which they gave their children. But the provinces had not finally triumphed; for the minority then went to the Privy Council[3] on the subject of the subsection of the Act which permits an appeal to the Governor-General in Council from any Act or decision of the legislature of a province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of Her Majesty's subjects in relation to education.

[1] *City of Winnipeg* v. *Barrett*; *Same* v. *Logan*, [1892] A. C. 445; 19 S. C. R. 374; 7 M. R. 273.

[2] 33 Vict. c. 3.

[3] *Brophy* v. *Attorney-General for Manitoba*, [1895] A. C. 202; 22 S. C. R. 577. Cf. also Egerton, *Federations and Unions*, pp. 152–4.

On this point they succeeded, for the Privy Council held without hesitation that, so far from their former judgement regulating this point as was contended, the subsection gave quite a different right from that dealt with in the previous subsection, one which applied as soon as the legislation of 1871 was passed, and that it depended on different principles. In the particular case they decided that the province had so acted as to allow an appeal to the Governor-General in Council against the decision of the Legislature in the Acts of 1890, and that the particular remedy to be applied must be determined by that authority, thus throwing upon the Federal Government the onus of acting so as to provide the desired result. The Dominion Government then proceeded to pass an Order in Council of March 21, 1895, calling attention to the points in which the legislature of the province was bound to legislate to restore to the Roman Catholics the rights of which they had been, it was declared, deprived unjustly.[1] The Manitoba Government not merely refused to ask the legislature to enact the measures indicated, but intimated their determination to resist unitedly, by every constitutional means, any such attempt to interfere with their provincial authority. The Dominion Government then proceeded to introduce a Bill into the House of Commons, in 1896, to effect the necessary legislation, this being the course authorized by s. 22 (3) of the Provincial Constitution Act, corresponding with the similar provision in the *British North America Act*[2] regarding the original provinces; but the fates were adverse: the Parliament, which had met on April 23, 1891, was on the point of expiring from efflux of time, and the Opposition resisted in a most determined manner, with the result that the Bill could not be passed, and the Government at the polls were defeated, and had to resign office under circumstances more fully explained above. Sir Wilfrid Laurier then opened negotiations with the Government of the province for a friendly settlement of the

[1] Canada *Sess. Pap.* 1896, No. 39; 1897, No. 35; Manitoba *Sess. Pap.*, 1909; *Canadian Annual Review*, 1907, pp. 575 seq. There is an excellent view of the facts in Willison, *Sir Wilfrid Laurier*, ii. 201–77. [2] S. 93.

matter; the negotiations were most fortunately successful, and an Act of the province restored to the minority certain facilities of a definite and limited but not ungenerous character for learning their language and being taught their religion in the public schools of the province.[1]

By this agreement, dated November 16, 1896, it was provided that religious teaching should be conducted if authorized by resolution passed by a majority of the school trustees, or if a petition were presented to the Board of School Trustees asking for such teaching and signed by the parents or guardians of at least ten children attending the school in the case of a rural district, or by the parents or guardians of at least twenty-five children in a city, town, or village. Such teaching was to take place between 3.30 p.m. and 4 p.m., and to be conducted by any Christian clergyman in whose charge lay any portion of the school district, or by a person duly authorized by such clergyman, or by a teacher when authorized. The teaching would be on every teaching day unless the resolution or the petition asked for it on certain specified days only. In any school in towns or cities with an average attendance of Roman Catholic children of forty and upwards, and in villages or rural districts with an average attendance of twenty-five or upwards, the trustees, if required by petition of the parents or guardians of such number of Roman Catholic children, must employ at least one duly certificated Roman Catholic teacher. Similarly the trustees, where the average attendance of non-Roman Catholic children was forty or twenty-five respectively, must, if required, employ at least one duly certificated non-Roman Catholic teacher.

Where religious teaching was required to be carried on in

[1] Manitoba Act, 60 Vict. c. 27; Sir W. Laurier in *House of Commons Debates*, 1897, pp. 63–6. In Alberta and Saskatchewan the Acts of 1905 provide for the continuance of separate schools; see, on the difficulties which have arisen, *Canadian Annual Review*, 1907, pp. 587 seq.; 1908, pp. 486, 491. The privileges accorded are practically (1) exemption from rates for other denominational schools; (2) right to have separate schools if desired; (3) half-hour's religious teaching (3.30–4 p.m.) for children whose parents desire it; see *Canadian Annual Review*, 1905, pp. 44 seq.

any school under the provisions of the agreement, and where both Roman Catholic and non-Roman Catholic children attended the school, and there was not adequate room to allow for separate accommodation for religious teaching, the Department of Education was to make regulations so that the Roman Catholic children could be taught on half the days of the month, and the non-Roman Catholic children on the other half. But during the secular school work no separation of the pupils was to take place. No pupils were to be permitted to be present at any religious teaching unless the parents or guardians desired it; otherwise they must either be kept in another room or dismissed before religious teaching took place.

As regards language, the settlement arranged was that when ten of the pupils in any school spoke the French language, or any other language than English as their native language, the teaching of such pupils should be conducted in French, or such other language, and in English, upon the bilingual system.

In Ontario there has been a decision in *The Separate School Trustees of Belleville* v. *Grainger* [1] that the appeal under s. 93 (3) lies only where some legal act is concerned, not merely because of matters affecting the everyday working of the school.

(*m*) *The Privileges of the Legislatures*

For a time it was contended by the Courts that a Provincial Legislature, in token of its absolutely subordinate position, could not pass an Act for conferring upon itself privileges equal to those of the House of Commons. This view was shared originally by the Dominion Government, and two Acts of Ontario and Quebec on this topic were disallowed. The same fate was awarded an Ontario and a Manitoba Act of 1874, but, with the usual inconsistency of Dominion action, an Act of 1876 was not disallowed. The Court of Queen's Bench in Quebec held that a statute of Quebec on this subject was *ultra vires*. On the other hand, it was shown clearly by the case of *Woodworth*,[2] decided by the Supreme

[1] 25 Gr. 570; 1 Cart. 816. [2] 2 S. C. R. 158. See above, pp. 450 seq.

Court of the Dominion in 1874, as had been held in cases decided by the Privy Council, that without legislation the Legislature had no power to punish the action of a member of the House of Assembly of Nova Scotia who had charged the Provincial Secretary of the day with having falsified a record, as the only power possessed by a mere legislature other than the Parliament of the United Kingdom was to punish such matters as actually obstructed business. Nova Scotia legislated in 1876 to secure the privileges, and this Act was allowed to remain in operation, the Privy Council [1] deciding in 1896, in a case which had been given against the power of the Legislature by the Lower Courts, that the Act was *intra vires*. In that case the Legislature had provided for the punishment of contempts such as refusal to attend when summoned by the House, and the plaintiff having refused to attend, had been taken in custody, and released under a writ of *habeas corpus*, when he proceeded to bring an action for assault and imprisonment. The difficulty which arose was, of course, due to the fact that the Dominion alone has the control of the criminal law, and that the Act purported to make the two Houses in matters of privilege Courts of Record. The Judicial Committee recognized that the Legislature could not set up criminal courts with new powers, but they held that the powers given by s. 92 were ample to cover an Act for the protection of the proceedings of the Legislature. It was true that the action to be punished might also amount to a criminal offence, but that was not relevant. Accordingly the validity of the provincial privilege Acts must be regarded as definitely settled.

(*n*) *Naturalization and Aliens*

The division of powers is also neatly illustrated by the control of the Dominion over naturalization and its relation to the provincial general powers of legislation. Thus the Privy Council [2] has decided that the British Columbia *Provincial Elections Act* (*Rev. Stat.*, 1897, c. 67), s. 8 of which

[1] *Fielding* v. *Thomas*, [1896] A. C. 600. See *Payson* v. *Hubert*, 34 S. C. R. 400. [2] *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

disqualified Japanese from voting, was not *ultra vires* of the Provincial Legislature. The Dominion Parliament has power to decide the conditions on which naturalization shall be accorded, but the rights of a naturalized person in any province must depend on the provincial law, a decision which really terminates the long-vexed questions still raised by Dominion Ministers of Justice as to legislation by the provinces allowing aliens to hold shares, &c. On the other hand, the Privy Council[1] held that the British Columbia *Coal Mines Regulation Act* prohibiting Chinamen from employment under ground was not *intra vires* the Provincial Legislature. They decided that the power exercised was not really a power to regulate coal mines, but to deprive the Chinese, naturalized or not, of the ordinary rights of inhabitants of the province, and in effect to prohibit their continued residence therein by preventing them earning their living in the province. This case was carefully distinguished from the suffrage case by the Judicial Committee. This decision seems to support the much older decision of Gray J., in the British Columbia case of *Tai Sing* v. *Maguire*,[2] where he held the *Chinese Tax Act*, 1878, of that province to be *ultra vires*, because in substance it was not a taxing Act at all, as it claimed to be, but an Act to drive Chinese from the country, and as such an interference with the Dominion control of trade and commerce, of the rights of aliens, and of Imperial treaties, though in this latter regard it may be pointed out that there were no such treaties in existence. The same Court held invalid the Act, 47 Vict. c. 4, to regulate the Chinese by imposing a tax of ten dollars on each, as not being a valid exercise of the taxing power, but really a special discrimination against Chinese.[3]

[1] *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A. C. 580.

[2] 1 B. C. (Irving) 101, decided in 1878; see *Provincial Legislation*, 1867–95, pp. 1061–7. The Act (42 Vict. c. 35) was disallowed thereafter as objectionable. See also ibid., pp. 244 b, 755; Lefroy, pp. 459, 460.

[3] See *Bull* v. *Wing Chong*, Wheeler, p. 122; *Provincial Legislation*, 1867–95, p. 1095. See also Quick and Garran, *Constitution of Commonwealth*, pp. 601–4, which adopts the extreme federal view. But cf. Sir O. Mowat

(*o*) *Administration of Justice and Criminal Law*

The control of the Dominion over criminal law is so complete that an Ontario Act to prevent the profanation of the Lord's Day was held to be *ultra vires* the Provincial Legislature.[1] The Dominion has legislated on the subject, and on a reference regarding the legislative power on the whole question, the Supreme Court decided in accordance with that ruling as to the powers of the provinces, though protesting against such a general reference on hypothetical matters.[2]

In *L'Association St. Jean-Baptiste de Montréal* v. *Brault*[3] the question arose of the power of the Provincial Legislature to allow the operation of lotteries forbidden by the criminal statutes of Canada, and the Court (Girouard J. dissenting) held that a contract in common law for the operation of a lottery forbidden by the criminal statutes of the Dominion was unlawful and could not be enforced in a court of justice. It is not a breach of the criminal law for a province to punish by imprisonment for default on a judgement debt ;[4] but a charge against a man of selling intoxicating liquors on Sunday is so far of a criminal character that a defendant could not be compelled to give evidence against himself.[5] If an offence is a crime in criminal law, the province has no authority to make provision for its trial and punishment : e.g. tampering with a witness cannot be punished by a Provincial Act, the Liquor Licence Act of

in *Provincial Legislation*, 1867–95, p. 214. Cf. *Reg.* v. *Gold Commissioners of Victoria District*, 2 B. C. (Irving) 260.

[1] *Attorney-General for Ontario* v. *Hamilton Street Railway*, [1903] A. C. 524.

[2] 35 S. C. R. 581.

[3] (1900) 30 S. C. R. 598. Cf. Sir J. Thompson in *Provincial Legislation*, 1867–95, p. 461.

[4] *Ex parte Ellis*, 1 P. and B. 593 ; 2 Cart. 527.

[5] *Reg.* v. *Roddy*, 41 U. C. Q. B. 291 ; 1 Cart. 709. Lefroy, op. cit., pp. 467, 468, thinks that this case is overruled by *Weiser* v. *Heintzman* (No. 2), (1893) 15 O. P. R. 407, where it was held that the Act, 56 Vict. c. 31, s. 5, which forbade the excusing of persons from answering questions on ground of tendency to criminate applied only to criminal proceedings under Canadian law.

Ontario ; [1] but in the sphere of its authority it can regulate procedure.[2] On the other hand, a British Columbia Act (36 Vict. c. 2) was disallowed as an attempt to regulate criminal procedure.[3] A Provincial Legislature can punish even by hard labour,[4] and the Attorney-General of the province is the proper person to prosecute in criminal cases.[5] In *Pillow* v. *The City of Montreal* [6] it was held that because a Provincial Act called an offence within the terms of the Act a ' common nuisance ', nevertheless that did not make it invalid, if the offence were not *per se* an indictable offence at common law. Again a Dominion Act [7] can punish frauds in the supplying of milk to cheese factories, but the Ontario Legislature [8] can impose sanctions for obeying such a rule as a matter of civil law.

In virtue of their office, Lieutenant-Governors must have power to appoint provincial officers, including minor judicial officers, for the major offices are definitely removed from their sphere of action by the express terms of the Act of 1867, which vests the appointment of the judges of the Supreme, District, and County Courts in the Governor-General. The Governor-General has indeed a general delegation of the right to appoint judges and other officers, but this delegation is confined in practice to appointments to federal offices, as it is intended to be. The power of the province to legislate as to appointments of justices has been discussed in various cases ; it includes the right—but not the exclusive right—to

[1] *Reg.* v. *Lawrence*, 43 U. C. Q. B. 164; 1 Cart. 742. In Australia the position is different ; e. g. a man may be punished under a Commonwealth statute *re* posts and telegraphs, and also by the state under common law ; see *R.* v. *Macdonald*, 7 W. A. L. R. 149.

[2] *Pope* v. *Griffith*, 16 L. C. J. 169 ; 2 Cart. 291 ; *ex parte Duncan*, ibid. 188; 2 Cart. 297; *Page* v. *Griffith*, 17 L. C. J. 302 ; 2 Cart. 308 ; *Coté* v. *Chauveau*, 7 Q. L. R. 258 ; Lefroy, op. cit., pp. 463 seq.

[3] *Provincial Legislation*, 1867–95, p. 1023.

[4] *Hodge* v. *The Queen*, 9 App. Cas. 117.

[5] *Attorney-General* v. *Niagara Falls Footbridge Co.*, 20 Gr. 34.

[6] (1885) M. L. R. 1 Q. B., at p. 401.

[7] *Reg.* v. *Wason*, (1890) 17 O. A. R. 221.

[8] *Reg.* v. *Stone*, (1892) 23 O. R. 46. See also Lefroy, op. cit., pp. 414, 415 ; *McCaffrey* v. *Hall*, (1891) 35 L. C. J. 38.

appoint police magistrates and justices of the peace :[1] but it cannot authorize the Lieutenant-Governor to remove County Court judges, or to abolish a court existing before 1867 for the trial of such judges.[2] It can continue an Act of 1865 authorizing the Governor to appoint police magistrates, although a Dominion Act of 1868 authorizes the Governor-General to make such appointments.[3] It was also held in another case that the prerogative power of the Crown to create courts of oyer and terminer and jail delivery remains, as neither Legislature nor Parliament had legislated.[4] Repeated attempts have been made by the provinces to intrude on the sphere of Dominion powers in these matters, but without success.[5] On the other hand, it has been held that various minor courts are within the provincial competence to create and maintain—e.g. Courts of Commission in New Brunswick under the Act 39 Vict. c. 5,[6] or Division Courts in Ontario.[7] In these cases extra powers were conferred on County Court judges. In Nova Scotia an Act, 60 Vict. c. 2, imposed fresh duties on judges of Probate or County Court judges without extra pay : the Act was protested against by a judge, but held *intra vires*

[1] *R.* v. *Bennett*, 1 O. R. 445 ; 2 Cart. 634 ; cf. *R.* v. *Horner*, 2 Steph. Dig. 450 ; 2 Cart. 317 ; *Reg.* v. *Bush*, 15 O. R. 398 ; 4 Cart. 690 ; *Richardson* v. *Ransom*, 10 O. R. 387 ; 4 Cart. 630. A Provincial Legislature can regulate the districts and jurisdiction of the magistrates ; see *In re County Courts of British Columbia*, 21 S. C. R. 446 ; 2 B. C. 53 ; Lefroy, op. cit., pp. 524, 525.

[2] *Re Squier*, 46 U. C. Q. B. 474 ; 1 Cart. 789.

[3] *R.* v. *Reno and Anderson*, 4 O. P. R. 281 ; 1 Cart. 810.

[4] *R.* v. *Amer*, 42 U. C. Q. B. 391 ; 1 Cart. 722. This decision has been held to be of very doubtful validity, but it seems correct.

[5] See Quebec Act 51 & 52 Vict. c. 20, for appointment of district magistrates disallowed on January 22, 1889 ; Canada *Sess. Pap.*, 1889, No. 47 ; cf. Lefroy, *Legislative Power in Canada*, pp. 141 seq. ; 5 Edw. VII. c. 18, British Columbia disallowed ; see *Provincial Legislation*, 1904–6, p. 155.

[6] *Ganong* v. *Bayley*, 1 P. and B. 324 ; 2 Cart. 509 ; see Lefroy, op. cit., pp. 69, 70, 169, 170, where Sir J. Thompson criticizes the case ; and p. 176, where he suggests that justices of the peace can only be appointed by Provincial Legislatures for provincial offences.

[7] *Wilson* v. *McGuire*, 2 O. R. 118 ; 2 Cart. 665 ; see Lefroy, pp. 522 seq.

and not disallowed.[1] In January 1889 Sir J. Thompson reviewed all the cases and correspondence on the matter in his elaborate report on the disallowance of a Quebec Act, 51 & 52 Vict. c. 20, regarding district magistrates.[2] This Act was intended to abolish the holding of the Circuit Court in the Montreal district, and to substitute a District Magistrate's Court to deal with all cases pending before the Circuit Court; to be presided over by two judges appointed by the Lieutenant-Governor in Council with salaries of $3,000 a year, who were not to be eligible for the Canadian Senate or Commons, and who were to hold office during good behaviour, but to be removable by the Lieutenant-Governor on addresses from the two Houses of Quebec. The Act was disallowed on September 7, 1888, and the Minister of Justice affirmed its impropriety very convincingly. A Supply Bill was disallowed in 1871 in Ontario because it increased judges' salaries; in 1875 a British Columbia Act (37 Vict. c. 9) was disallowed because it fixed the residence of judges; in 1880 an Ontario Act (42 Vict. c. 19) to appoint a judge was disallowed; in 1883 an Act of British Columbia (45 Vict. c. 8) for the appointment of gold commissioners was disallowed.

There is no doubt as to the power of the Federal Parliament to impose duties on Provincial Courts,[3] but it could also empower new courts to deal with its special subjects, e.g. bankruptcy,[4] and in a case regarding control of electoral revising officers it was held that the Ontario Court could not control the revising officers,[5] and the Canadian Parliament has vested the Railway Commissioners with special powers of a judicial character,[6] and so as regards patents, the Act of

[1] *Provincial Legislation*, 1896–8, pp. 36 seq.

[2] See Lefroy, op. cit., pp. 140–75.

[3] *Valin* v. *Langlois*, 5 App. Cas. 115; Lefroy, op. cit., pp. 511–3, who rightly criticizes *Piel Ke-ark-an* v. *Reg.*, (1891) 2 B. C. (Hunter), at p. 76. See also *ex parte Perkins*, 24 N. B. 66, at p. 70; *ex parte Porter*, (1889), 28 N. B. 587.

[4] 3 S. C. R., at p. 76, per Taschereau J.

[5] *Re North Perth, Hessin* v. *Lloyd*, (1891) 21 O. R. 538.

[6] *Canadian Pacific Railway Co.* v. *Northern Pacific, &c., Railway Co.*, (1888) 5 M. R., at p. 313. A Provincial Act of Quebec of 1890 giving

1872 (35 Vict. c. 26) gave the power in certain cases to the Minister of Agriculture or his deputy to decide what patents were void, and the power was upheld *in re Bell Telephone Co.*[1]

(*p*) *Trade and Commerce*

Again, the wide words 'regulation of trade and commerce', which assign powers to the Federal Parliament, have been interpreted by the Judicial Committee to mean political arrangements in regard to trade and requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and perhaps general regulation of trade affecting the whole Dominion. But it was held that they certainly did not give power to legislate to regulate contracts of insurance in a single province, and the validity of an Ontario Act regarding insurance was therefore upheld,[2] despite the fact that the company held a licence from the Dominion Parliament. On the other hand, they held that the Dominion Parliament could legitimately require every insurance company to take out a licence before they undertook insurance business anywhere in the Dominion. Even if a company, established under a Dominion Act, confines its business to one province only, it has, under the Act of incorporation by the Dominion Parliament, the status of a company,[3] and though its operations are subject to local law, it can act as a corporate body subject only to such law regulating the details of its action, but there is pending an important question, to which reference will be made later, as to the validity of an Act of British Columbia which prevents companies carrying on business in the province unless they register and pay the necessary fee, or obtain licences on similar

certain powers in railway matters to the Railway Committee of the Executive Council was allowed to stand; see *Provincial Legislation*, 1867–95, p. 435.

[1] 7 O. R. 605.

[2] *The Citizens and Queen Insurance Companies* v. *Parsons*, 7 App. Cas. 96; cf. 4 S. C. R. 215, which agreed as to the principle, Taschereau and Gwynne JJ. dissenting; Quick and Garran, *Constitution of Commonwealth*, pp. 513 seq.

[3] *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157, overruling *Loranger* v. *Colonial Building and Investment Association*, 5 L. N. 116; 2 Cart. 275.

conditions. On the other hand, an attempt by Quebec to impose a tax upon the policies of insurance issued by a company doing business there has been defeated by the Privy Council holding that the real nature of the duty was a stamp tax, and that such a tax was not within the powers of the province.[1] So also with regard to stamps on legal proceedings.[2] On the other hand, it has been held that the Nova Scotia law could impose a tax on Dominion notes held by a bank as part of its cash reserve under the Dominion Acts relating to banks and banking (34 Vict. c. 5).[3] Moreover, in the leading case of *Bank of Toronto* v. *Lambe*, a tax on banks varying with the amount of paid-up capital and number of offices was held to be direct taxation within the meaning of s. 92 (2).[4] The question of taxation will be further considered below.

For a much wider definition of the meaning of trade and commerce than has been accepted by the Privy Council,[5] there may be quoted the views of all the judges, and especially of Gwynne [6] and Sedgewick [7] JJ. in the Prohibitory Liquor Laws case, and of Taschereau and Gwynne JJ. in the fire insurance case. But the wide interpretation of the term would, it seems, clearly have been contrary to the scheme of an Act which mentions particularly so many branches of trade and commerce as specifically reserved to the Dominion Parliament, and the desire to explain away those reservations, though natural, is difficult to satisfy.

[1] *Attorney-General for Quebec* v. *Queen Insurance Co.*, 3 App. Cas. 1090.

[2] *Attorney-General of Quebec* v. *Reed*, 10 App. Cas. 141.

[3] *Windsor* v. *Commercial Bank of Windsor*, 3 R. & G. 420.

[4] 12 App. Cas. 575.

[5] See [1896] A. C. 348, at p. 363, which makes it clear that *Russell* v. *Reg.*, 7 App. Cas. 829, does not decide on this issue, as had been thought in Canada.

[6] 24 S. C. R. 170, at pp. 204 seq., and see *Fredericton* v. *The Queen*, 3 S. C. R. 505; *Reg.* v. *Justices of King's County*, (1875) 2 Pugs. 535.

[7] 24 S. C. R. 170, at pp. 230 seq. See also Lefroy, op. cit., pp. 551 seq.; Quick and Garran, *Constitution of Commonwealth*, pp. 542 seq.

(q) *The Powers of Companies*

With trade and commerce is bound up the very difficult question of the provincial and Dominion powers as to the incorporation and regulation of companies.[1]

The position of a company incorporated under provincial law was fully considered in the *Canadian Pacific Railway Company* v. *Ottawa Fire Insurance Co.*[2] The issue there was whether the defendant company was empowered to insure property outside Canada, viz. in Maine, by the law of which state a company is given an insurable interest in property along its line of route, so as to enable it to insure itself for liability for injury to such property. It was contended that the contract was utterly null and void, and as the question involved was one of principle, the Court had it fully argued by the Attorneys-General of the Dominion and of the Provinces. Finally three judges (Idington, Maclennan, and Duff) held that the company could insure property outside Canada. Idington J. insisted that the power rested on international comity alone : the province could limit the powers of a corporation, and forbid it contracting outside ; but the province, if it merely incorporated, left its position outside to be determined by comity, and he could see no difference between the Dominion and the provinces in this regard. The other two judges expressed somewhat similar views. The Chief Justice held otherwise ; he held, as Ministers of Justice had done,[3] that extra-provincial insurance was not within the company's power, and added that the Dominion Act [4] which affected to allow provincial companies to do extra-provincial business was *ultra vires* : the Parliament must create for this end a new corporation by itself. Davies J. held that ' provincial ' must be read in a territorial sense, not generally as matters referring to the province, and that the legislation was *ultra*

[1] For the older cases, see Lefroy, op. cit., pp. 617–44.

[2] (1907) 39 S. C. R. 405.

[3] *Provincial Legislation*, 1867–95, p. 261 (Mr. Blake) ; 1896–8, pp. 17, 33 (Sir O. Mowat) ; see also 1867–95, pp. 142, 492, 635, 811, 1052, 1162, 1182 ; 1904–6, pp. 32 seq., 57–60, 72, 107–9, 115, 166, 176 ; Lefroy, op. cit., pp. 638, 639.

[4] *Revised Statutes*, 1906, c. 34, s. 4.

vires, citing *Citizens' Insurance Co. of Canada* v. *Parsons*,[1] and *Colonial Building and Investment Association* v. *Attorney-General of Quebec*.[2] He admitted that the company could conclude contracts outside (e.g. buy machinery), but only as ancillary to provincial operations.

In this case, besides the particular points at issue, the following general questions were asked :—

1. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated ?

2. Can an insurance company incorporated by letters patent issued under the authority of a Provincial Act carry on extra-provincial or universal insurance business, i.e. make contracts and insure property outside of the province, or make contracts within to insure property situate beyond ?

3. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits ?

4. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries ?

The judgement of the Court on the case was substantially in favour of the provinces, except that the last question was not answered by the majority of the Supreme Court. The Canadian Government have now brought before the Supreme Court the whole question of the powers of the provinces and the Dominion regarding companies on a special reference by the Governor-General in Council, which the Supreme Court has decided it has authority to hear. But from the preliminary point an appeal has been brought to the Crown in Council. The difficulty is brought to a head by the British Columbia Act c. 7 of 1910,[3] which requires all foreign companies either to be registered or take out a licence to act, and which forbids the recovery by such companies of debts within the province if not so registered and licensed,

[1] 7 App. Cas. 96. [2] 9 App. Cas. 157.

[3] See also Manitoba Acts 1911, cc. 9 and 10.

a decidedly drastic provision, and one which has been attacked in the province itself as a needless drag upon business done by non-resident companies by correspondence.

It may be noted that the Dominion Government has disallowed Acts cc. 43–5 of 1909 of Saskatchewan, Quebec Act c. 82 of 1910, and Manitoba Act c. 82 of 1910, because they contain clauses authorizing companies to carry on extra-provincial trade, and apparently the Dominion policy is to insist on the limitation of provincial authority. On the other hand, they have not disallowed Acts imposing heavy taxation on commercial travellers, though such Acts in 1905 caused much excitement in connexion with Quebec and British Columbia,[1] and were alleged to interfere with the Dominion control of trade generally, and between the provinces and foreign countries. But they have disallowed legislation of an exceptional character affecting companies incorporated under British or Canadian law less favourably than companies of the province.[2] It is also contended by Lefroy[3] that if the company is incorporated for objects within the exclusive power in s. 91, its operation can be regulated by the Dominion only.

If a company is incorporated under a provincial Act, the Dominion Parliament claim the power to extend its authority over the whole of Canada by the plan of granting a licence, as in the Dominion Insurance Act (40 Vict. c. 42, s. 28), and *a fortiori* it may give it federal incorporation for federal

[1] See Acts 5 Edw. VII. c. 31 (Quebec) and 7 Edw. VII. c. 10 (British Columbia); *Provincial Legislation*, 1904–6, pp. 14, 15, 140, 154. A Manitoba Act, 58 & 59 Vict. c. 4, was disallowed merely because it imposed a licence fee on all companies with provincial objects; ibid., pp. 1005–10.

[2] See *Provincial Legislation*, 1867–95, pp. 941, 1007; 1896–8, pp. 60–71, 81–3; 1899–1900, pp. 11 seq., 48; 1901–3, pp. 21, 22, 104 seq.; 1904–6, p. 69. Most of them are British Columbia Acts, but see Ontario Act 63 Vict. c. 24.

[3] Op. cit., p. 622. The difficulties of limiting the powers of the province are seen at p. 623, note 1; cf. Cameron J. in *Clegg* v. *Grand Trunk Railway Co.*, 10 O. R. 714. Nothing but express legislation on the topics would do (cf. p. 626); cf. *Hamilton Powder Co.* v. *Lambe*, (1885) M. L. R., 1 Q. B. 460. What constitutes action by a company in a province is dealt with in *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, [1911] A. C. 78.

purposes, and companies not rarely, to avoid tedious conflicts of jurisdiction, incorporate themselves both federally and provincially, especially if they desire navigation privileges, or the power to bridge over a navigable stream, for which they must, in any case, have parliamentary authority.[1] In one case at least the Dominion has incorporated a company with a purely provincial object, viz. the Act incorporating the Anticosti Company, which Ritchie C.J. declared in *Forsyth* v. *Bury*[2] to be clearly *ultra vires*. But a company incorporated by the Dominion may *de facto* confine itself legally to one province.[3]

The provinces have on several occasions set up chartered corporations, a curious name for a body merely incorporated by Act and not by charter, but there is no ground on which exception could be taken to the Acts. On the other hand, an Ontario Act of 1908 regarding the Chartered Accountants' Corporation of Ontario was disallowed in 1909, because it forbade any resident member of the Chartered Institute of the United Kingdom from describing himself as a chartered accountant while within the limits of the province. Ontario in 1910 re-enacted this Act (c. 79), which was disallowed, and again in 1911 (c. 48), also presumably to be disallowed, and Alberta in 1910 (c. 43) has thus legislated.

The supremacy of the Dominion legislation over provincial legislation as to company incorporation when both are valid was asserted in the case of *La Compagnie hydraulique de St. François* v. *Continental Heat and Light Company*.[4] In

[1] Cf. Bourinot, *Parliamentary Procedure and Practice*,[2] p. 680; *Provincial Legislation*, 1867–95, pp. 379, 1118; *re Brandon Bridge*, (1884) 2 M. R. 14; Dominion Act 45 Vict. c. 37; *House of Commons Debates*, 1910–1, pp. 7818 seq.

[2] (1888) 15 S. C. R. 543, at p. 549. See Strong J., at p. 551; contra, Gwynne J.

[3] Lefroy, op. cit., p. 636, note 2. In 1881 the Bell Telephone Co. was held by the Quebec Courts to have no right to operate in the province under the Dominion Act 43 Vict. c. 67, and local Acts were passed for its benefit there in 1882; in New Brunswick, Nova Scotia, and Ontario in 1882; and in the same year the Dominion Parliament declared it a work for the general advantage of Canada. But the Quebec decision was, no doubt, wrong.

[4] [1909] A. C. 194. Cf. *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A. C. 237.

that case a Dominion statute (60 & 61 Vict. c. 72) had incorporated a company with powers as to the sale of electricity which extended over the whole of the Dominion, and on the other hand the appellant company had received privileges from the Legislature of Quebec (2 Edw. VII. c. 76; 4 Edw. VII. c. 84), which were in part exclusive of the operations of any other company. It was held by the Judicial Committee that the Provincial Act could not be held to limit the privileges conferred by the Dominion Act, and that therefore the company incorporated by the Dominion Act must be deemed not to be affected by the Provincial Act. This case is interesting especially in view of the fact that the provinces have continually passed legislation requiring Dominion companies to take out licences as a condition of carrying on operations in each of the provinces. The matter has been repeatedly considered by successive Ministers of Justice, and the tendency has been to doubt whether the power to insist on the taking out of a licence exists at all, or at any rate whether it exists in the case of companies which are incorporated under the powers granted specifically to the Dominion Parliament by s. 91; but there is as yet no final decision on the matter.

(r) *Railway Companies, &c.*

The position of railway companies is of increasing importance and interest. The net result of s. 92, subsection 10 (a) of the *British North America Act*, when read in conjunction with s. 91 (29), is to confer upon the Dominion Parliament exclusive right of legislation with regard to railways, canals, telegraphs, and other works, and undertakings connecting a province with any other province or provinces, or extending beyond the limits of the province. This provision, however, still leaves difficulties, for the legislative power must be exercised within the sphere of the subjects with which it deals, and it is by no means easy to determine what is to be regarded as being fairly legislation concerning railways, and what would be an infringement of the powers of the province to legislate exclusively regarding property and private rights.

The cases are interesting and somewhat complicated, and the recent decisions of the Privy Council have rendered invalid a good many of the older cases.

In the case of *Madden* v. *Nelson and Port Sheppard Railway Company*,[1] it was determined by the Privy Council that it was not within the competence of the Legislature of British Columbia under an Act of 1891, as amended in 1896, to compel a railway which fell within the jurisdiction of the Dominion to erect fencing to prevent the straying of cattle.

The Court were clearly of opinion that not only was it *ultra vires* for the Legislature to do so by direct enactment, but that it was also *ultra vires* to do so indirectly, and therefore it must be deemed to have been considered that when within the legislative control of the Dominion no interference with purely railway matters such as this was competent to a Provincial Legislature. In that case the Court had also to consider the somewhat awkward fact that they had shortly before decided in the case of the *Canadian Pacific Railway Company* v. *Corporation of the Parish of Notre Dame de Bonsecours*,[2] that though the Legislature of Quebec was not in a position to make any law affecting the construction of a railway within the jurisdiction of the Dominion, nevertheless the railway company was liable if it permitted a ditch to be choked up and become a nuisance. It is, of course, possible to draw a logical distinction between the cases and to see that the difference of decision is justifiable, but it is unquestionable that the latter case is on the boundary line.

Other instances of the same difficulties are seen in the question which was discussed at length in the Supreme Court of Canada,[3] and again in the Privy Council, as to the right of the Dominion Parliament to pass an Act which forbade railway companies contracting themselves out of

[1] [1899] A. C. 626. Followed (as regards power of Quebec Legislature to direct building of crossings over a railway) in *Grand Trunk Railway Co.* v. *Therrien*, (1900) 30 S. C. R. 485, and (as regards provision against fires caused by engine sparks) in *Canadian Pacific Railway Co.* v. *The King*, (1907) 39 S. C. R. 476. Cf. also *Monkhouse* v. *Grand Trunk Railway*, 8 O. A. R. 637; 3 Cart. 289; Lefroy, op. cit., pp. 445 seq.

[2] [1899] A. C. 467.

[3] 36 S. C. R. 136.

liability for injuries to their employees.[1] It was argued on behalf of the Grand Trunk Pacific Railway Company that this was essentially a matter to be governed by provincial legislation, but it was held by both Courts that the legislation was within the power of the Dominion, which alone could make a law for the whole Dominion, and that it was both reasonable and convenient that the Dominion Parliament should have such power, thus preventing difference of treatment according to the locality in which an accident to an employee took place.

Another instance of the same question is afforded by the case of the *Toronto Corporation* v. *Canadian Pacific Railway Company*.[2] Under the Railway Act of Canada, the Railway Committee of the Privy Council was empowered to require, where it thought fit, that crossings should be protected either by gates or by the building of bridges and so forth, and it was also enacted that the Dominion could apportion between the railway company and other persons interested the cost of such protection. Accordingly the Railway Committee did apportion the cost between the railway company and the Corporation of Toronto, and the corporation protested on the ground that it had no authority to make payments save under the Provincial Acts regulating it. But it was held both by the Supreme Court of Canada[3] and by the Privy Council that the power given by the Dominion Act was *intra vires* and was effective, even if the municipality was not physically adjacent to the railway.[4]

Subsection 10 (c) of s. 92 gives the Dominion power to legislate with regard to such works as, though wholly situate within the province, are before or after their execution declared to be for the general advantage of Canada or for

[1] *Grand Trunk Railway Co.* v. *Attorney-General of Canada*, [1907] A. C. 65.

[2] [1908] A. C. 54.

[3] *The City of Toronto* v. *Grand Trunk Railway Co.*, 37 S. C. R. 232; cf. 25 O. A. R. 65.

[4] *The City of Carleton* v. *The County of Ottawa*, 41 S. C. R. 552. On the power of Canada to take over provincial railways under s. 92 (10), see Lefroy, op. cit., pp. 603–5.

the advantage of two or more provinces. This power must be read in connexion with subsection 11, which permits the Provincial Legislatures to incorporate companies with provincial objects.

In the case of *Hewson* v. *Ontario Power Company*,[1] the Supreme Court of Canada was divided in opinion, two judges on one side and two on the other, as to whether a declaration that a work was for the public advantage of Canada contained in the preamble to a private Act fell within the meaning of Clause (c), but the Court were unanimously of opinion that when an Act provided for a power company connecting its wires with the wires of foreign countries, it was clear that it fell within the jurisdiction of the Dominion, and they decided the case in question on that basis. This is in accord with the view of the Privy Council in the case of *Toronto Corporation* v. *Bell Telephone Co. of Canada*.[2]

The question was raised, though it was not formally decided, as to whether the Provincial Legislature could have incorporated the company in question. The Court appeared to be of opinion that it could not have done so if the company had been authorized to connect its wires with those of a company in another province, in view of the terms of subsection 11, and they inclined to the view that a Provincial Legislature could not authorize a company to connect its wires with those of a company in a foreign country.

A distinction was drawn between the case of the Dominion and the provinces. In both cases no doubt a legislation empowering the company to do matters outside the boundaries was subject for its effect to international comity, but in the case of a province the express power conferred on the province was limited by the requirement that the object should be provincial, and therefore, while the Dominion was under no disability in law, the province was under an express legal disability.

This view is paralleled by the constant criticisms of the Ministers of Justice on Provincial Acts which permit railways

[1] 36 S. C. R. 596.

[2] [1905] A. C. 52, overruling *R.* v. *Mohr*, 7 Q. L. R. 183.

to be run up to the boundaries of the provinces,[1] and also by their criticisms on Provincial Acts which empower companies to do things outside the limits of the province. They have insisted on the view that the express prohibition contained in the British North America Act must be given effect to, and, as seen above, this view has been enforced recently by the disallowance of the Saskatchewan and other provincial Acts above mentioned, all of which incorporate companies without regarding this limitation.[2]

But the power of the provinces cannot be ignored. If a provincial and a Dominion railway cross, both consents, that of the province no less than that of the Dominion, are needed,[3] though the transfer of a railway declared a federal railway cannot be authorized by a provincial Act.[4] In the case of *Montreal Street Railway Co.* v. *City of Montreal*[5] the majority of the Supreme Court (Fitzpatrick C.J., Girouard, Idington, and Duff JJ.) held (Davies and Anglin JJ. dissenting) that it was not within the power of the Dominion by s. 8 (6) of the *Railway Act* to give the Railway Commissioners jurisdiction to make orders respecting through traffic over a provincial tramway or railway which crosses a railway subject to the authority of the Parliament of Canada. The case was decidedly a difficult one : a distinction was drawn between a provincial railway declared federal and a federal line which was interprovincial, and the judgements of Davies and Anglin show how much can be said for the Dominion, especially when the case of *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*[6] establishes the right of the Dominion to affect by railway legislation the property of the province.

[1] On this, cf. *Dow* v. *Black*, 6 P. C. 272.

[2] This has been held valid in Ontario as well as by the Supreme Court (above, p. 705); see *Clarke* v. *Union Fire Insurance Co.*, 6 O. R. 223; 10 O. P. R. 313.

[3] *Credit Valley Railway Co.* v. *Great Western Railway Co.*, 25 Gr. 507; 1 Cart. 822.

[4] *Bourgoin* v. *Chemin de Fer de Montréal, Ottawa, et Occidental*, 5 App. Cas. 381, at p. 404.

[5] (1910) 43 S. C. R. 197.

[6] [1906] A. C. 204.

(s) *Banking, Insolvency, &c.*

Difficulties have also arisen in the case where both the Dominion and the provinces have legislative authority, and the decisions are often based on decidedly narrow lines.

In the case of *Tennant* v. *Union Bank of Canada*[1] the question arose as to whether an Act (46 Vict. c. 120) of the Dominion under which warehouse receipts were negotiable instruments was valid, or whether it must be held to be invalid as dealing with private rights in the province, a subject on which exclusive legislative authority was given to the province by s. 91 (13). It was then held that, though the matter was within the sphere of provincial authority, it fell also within the power of the Dominion as to banking, which included all transactions auxiliary to banking, and that the Dominion Act was accordingly valid. It was argued on behalf of the province that the power of the Dominion to legislate as to banking companies would enable it to deprive those companies of privileges conferred by provincial law, but that it would not enable it to confer on banking corporations privileges contradictory to such provincial law, but this view was not successful.

On the other hand, in the case of *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*,[2] the question arose whether an Ontario Act relative to voluntary assignments of property, which it preferred to incompleted judgements, was an infringement of the right of the Parliament of Canada to legislate on bankruptcy, and it was held that it was not such an infringement so long as the Parliament of Canada had not in legislating on bankruptcy enacted a provision which would be contrary to the provincial legislation.

It has been decided that an Act of the Dominion

[1] [1894] A. C. 31; cf. Lefroy, op. cit., pp. 426 seq.

[2] [1894] A. C. 189, reversing 20 O. A. R. 489. Cf. *Kinney* v. *Dudman*, (1876) 2 R. & C. 19; Lefroy, pp. 438, 439; *Peek* v. *Shields*, (1880–3) 31 U. C. C. P. 112; 6 O. A. R. 639; 8 S. C. R. 579.

Parliament to provide for the liquidation of all building societies in Quebec, whether solvent or not, is beyond the competence of the Dominion Parliament.[1]

(t) *Navigation*

It is within the powers of the Provincial Legislature to incorporate companies for navigation purposes within a single province,[2] though the exclusive right is negatived by the later decision of the Privy Council in the *Colonial Building and Investment Association* v. *Attorney-General of Quebec*.[3] But though a Provincial Legislature may incorporate a boom company, it cannot authorize it to obstruct the navigation of a tidal and navigable river.[4] On the other hand, the legislature may exercise municipal and police control on navigable waters, and the municipality of St. John's was held entitled to have its boundaries extended to the middle of a navigable river, and to tax the property added to its boundaries,[5] while municipalities can be authorized to impose an annual tax on ferrymen or steamboat ferries,[6] and a water lot granted by a legislature is valid even when it extends into deep water, subject to its not interfering with navigation.[7] The subject has frequently formed the topic of comment by Ministers of Justice on Provincial Acts,[8] and

[1] *McClanaghan* v. *St. Anne's Mutual Building Society*, 24 L. C. J. 162; 2 Cart. 237. For cases on the power, see *Coté* v. *Watson*, 3 Q. L. R. 157; 2 Cart. 343; *Kinney* v. *Dudman*, 2 R. & C. 19; *Peek* v. *Shields*, 3 Cart. 266; *Shoolbred* v. *Clarke*, 6 O. A. R. 639; 17 S. C. R. 265; *Allen* v. *Hanson*, 18 S. C. R. 667; *Quirt* v. *Reg.*, 19 S. C. R. 510; 17 O. R. 618; 17 O. A. R. 452; *Merchants' Bank of Halifax* v. *Gillespie*, 10 S. C. R. 312; Quick and Garran, *Constitution of Commonwealth*, pp. 586–93.

[2] *Macdougall* v. *Union Navigation Co.*, (1891) 21 L. C. J. 38; 2 Cart. 228. Cf. Lefroy, op. cit., pp. 640–6; *Dinner et al.* v. *Humberstone*, 26 S. C. R. 252.

[3] 9 App. Cas. 157.

[4] *Queddy River Driving Boom Co.* v. *Davidson*, 10 S. C. R. 222; 3 Cart. 243, overruling *McMillan* v. *South-west Boom Co.*, 1 P. & B. 715.

[5] *Central Vermont Railway* v. *St. John's*, 14 S. C. R. 288; 4 Cart. 326.

[6] *Longeuil Navigation Co.* v. *City of Montreal*, 15 S. C. R. 566; 4 Cart. 370.

[7] *Normand* v. *St. Lawrence Navigation Co.*, 5 Q. L. R. 215; 2 Cart. 231.

[8] Cf. *Provincial Legislation*, 1867–95, p. 558.

an Act of Quebec (38 Vict. c. 47) was disallowed. Quarantine has also been protected by disallowance of an Act of Manitoba (53 Vict. c. 31) from provincial interference. Collision regulations are laid down by Canadian law, which follows, but not absolutely, English legislation.[1]

(*u*) *Provincial Taxation*

The question of provincial taxation, which was mentioned above under Trade and Commerce, was considered also in *The Brewers' and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario*[2] when a licence fee for brewers, distillers, and others to sell in the province was held valid, and in the case of *Dow* v. *Black*[3] the purposes of the taxation were asserted to cover all provincial purposes, not only provincial as distinct from municipal, as has been suggested. Apparently, therefore, the power given in s. 92 (9) is not one of indirect taxation, but was merely included to render the mode of raising revenue indisputably legal.

It is natural that the provinces should be confined to direct taxation : ss. 121 and 122 remove clearly Customs and Excise from their purview. But whether under subsection 16 they have powers of indirect taxation is a vexed question, to which Mr. Lefroy[4] tends to give an affirmative answer ; if so, possibly they have such powers under other subsections, e. g. 14, but the matter is doubtful, and the Manitoba Court has negatived the power under subsection 14.[5] It is clear, however, that under the power of direct taxation there is no rule in favour of uniformity[6] as demanded by the United States Constitution and apparently by the Constitution of the Commonwealth (s. 51 (ii)). Nor can the class of licences in respect of which fees can be charged be limited.[7]

[1] *The 'Cuba'* v. *McMillan*, (1891) 26 S. C. R. 651, a decision which seems to be invalid as the Canadian law is repugnant to the Imperial *Merchant Shipping Act*, 1894. [2] [1897] A. C. 231. [3] (1875) 6 P. C. 272.

[4] Op. cit., pp. 730–40, where all the dicta then available are collected.

[5] *Dulmage* v. *Douglas*, 4 M. R. 495, overruling Dubuc J., 3 M. R. 562.

[6] Lefroy, p. 720, note.

[7] Cf. [1897] A. C. 231 ; Lefroy, p. 725, note 3. Contra, *Reg.* v. *Mee Wah*, (1886) 3 B. C. 403.

(v) *Dominion and Provincial Delegation*

The Provincial Legislatures, as has been seen above,[1] are not delegates of the Dominion Parliament or of the Imperial Parliament, and they can freely delegate their authority to the extent indicated in *Hodge* v. *The Queen*.[2] So in *Attorney-General of British Columbia* v. *Milne*[3] it was laid down that the Health Act of British Columbia, which permitted the Lieutenant-Governor in Council to make regulations regarding Boards of Health, was *intra vires* the legislature. It is not, however, clear how far such delegation can proceed: could a Provincial Legislature set up another body with the same powers by enacting that its regulations on the topics in s. 92 should be law? That would probably be *ultra vires*[4]: the legislature can change its constitution,[5] but not create two legislatures, hence the matter must rest on hypothesis. Again, the Dominion Parliament can make its laws dependent on action by the Provincial Parliaments. Thus in *Reg.* v. *O'Rourke*[6] was upheld the validity of the Dominion Act, 32 & 33 Vict. c. 29, s. 44, which permitted the qualifications of jurors to be decided by provincial Acts, although the qualification of jurors is essentially a Dominion power.[7] So s. 308 of the Dominion Railway Act of 1888 (51 Vict. c. 29) allowed the Governor-General to confirm Acts of the Provincial Legislature which had been passed before 1888 to regulate railways declared by Canadian Act to be for the public benefit of Canada, and thus falling under the sole control of the Canadian Parliament.

Such delegation by legislatures to municipal bodies is clearly legal, despite the fact that it really deprives the Crown

[1] See Part III, chap. i. [2] 9 App. Cas. 117.

[3] (1892) 2 B. C. (Hunter) 196.

[4] Cf. *The Queen* v. *Burah*, 3 App. Cas. 889, at p. 905; Begbie C.J., in the *Thrasher case*, 1 B. C. (Irving), at p. 175.

[4] Cf. Mr. H. Davey's argument in *Hodge* v. *The Queen*, Canada *Sess. Pap.*, 1884, No. 30, p. 10; Lefroy, op. cit., pp. 689–700.

[6] (1882) 32 U. C. C. P. 388; 1 O. R. 464. So held also in *Reg.* v. *Prevost*, (1885) 29 L. C. J. 253.

[7] *Provincial Legislation*, p. 1125 (Sir J. Thompson on British Columbia Act, 1891, c. 14).

of its negative voice in legislation,[1] a difficulty often seen in cases of municipal action in British Colonies against Indians and natives, which cannot be controlled by the Crown.

(*w*) *The Plenary Power of the Provinces*

Similarly the Provincial Legislatures are not hampered by considerations of non-interference with Dominion powers, or vice versa, which have been used to regulate the division of powers in Australia. That was laid down once and for all in *Bank of Toronto* v. *Lambe*,[2] when the analogy of American decisions was decisively rejected, but it had been asserted in a series of inferior Canadian cases[3] that the provinces could not tax the salary of a Dominion official, a doctrine decisively rejected by the Supreme Court of Canada[4] when the point came before it. The same principle of the equality of province and Dominion in their own lines is asserted in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General for New Brunswick*.[5] The principle asserted in *Coté* v. *Watson*[6], that a Provincial Legislature could not raise a tax on the sum realized from the sale of an insolvent's effects, cannot now be upheld in view of *The Brewers' and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario*.[7]

So again the wide sense given to the trade and commerce power in *Severn* v. *The Queen*[8] as forbidding a licence fee on brewers is shown to be untenable by the later decisions,

[1] Cf. Mr. H. Davey in Canada *Sess. Pap.*, 1888, No. 30, p. 113. Similarly in England there is now no veto on municipal by-laws, though such a veto was contained in the Municipal Reform Act, 1835, 5 & 6 Will. IV. c. 76, s. 90.

[2] 12 App. Cas. 575. See also Lefroy, op. cit., pp. 662–82.

[3] *Leprohon* v. *City of Ottawa*, (1877–8) 40 U. C. Q. B. 478; 2 O. A. R. 522; cf. *ex parte Owen*, (1881) 4 P. & B. 487; *Ackman* v. *The Town of Moncton*, (1884) 24 N. B. 103; *Reg.* v. *Bowell*, (1896) 4 B. C. 498.

[4] *Abbott* v. *City of St. John*, 40 S. C. R. 597.

[5] [1892] A. C. 437.

[6] (1877) 3 Q. L. R. 157.

[7] [1897] A. C. 231. For a curious case of an ineffectual attempt to override a Privy Council decision ([1907] A. C. 315), see *Toronto Corporation* v. *Toronto Railway*, [1910] A. C. 312, as to Ontario Act, 1908, c. 112.

[8] (1878) 2 S. C. R. 70. Cf. Gray J. in *Tai Sing* v. *Maguire*, (1882) 1 B. C. (Irving), at p. 106.

and the Privy Council in the case of the prohibitory liquor laws [1] even allowed a province to forbid manufacture if its prohibition could be regarded in any one case as a merely provincial matter; while they did not think importation could be forbidden, because that would go beyond private or local matters solely. But they did not accept as a ground the view that prohibition of manufacture or importation would interfere with Dominion powers.[2]

It follows also that even in cases where the Dominion Parliament could legislate, the Provincial Legislature can still legislate until the Dominion takes up the ground. That was decided in *L'Union St. Jacques de Montréal* v. *Belisle*,[3] where a Provincial Act forced two widows to commute their existing rights to relieve an embarrassed society from danger of insolvency. So Sir J. Thompson [4] allowed a Nova Scotia Act of 1888 to remain in operation, though it regulated for prevention of disease the arrival of boats from one part of the province to another, because it was probably valid until it conflicted with an actual Dominion law, a principle quite different from the American rule that the silence of Congress on navigation and commerce means that no rule is to exist.

(*x*) *Local Legislation*

The power to regulate local matters under s. 92 (16) is a wide one, and includes all merely provincial concerns, whether extending over a province [5] or parts thereof.[6] The killing of game in Manitoba has been held local by the Queen's Bench of that province.[7] The question is full of difficulties: public

[1] [1896] A. C. 348, at p. 371.

[2] This was taken as a ground by Strong C.J. in *In re Prohibitory Liquor Laws*, 24 S. C. R. 170, at p. 204; per King J., at p. 262.

[3] (1874) 6 P. C. 31.

[4] *Provincial Legislation*, 1867–95, p. 582. Cf. also pp. 946, 947; Lefroy, op. cit., pp. 683–8; *ex parte Ellis*, (1878) 1 P. & B. 593, at pp. 598, 599; *Canadian Pacific Navigation Co.* v. *The City of Vancouver*, 2 B. C. 193; *Ringfret* v. *Pope*, 12 Q. L. R. 303.

[5] *Hodge* v. *The Queen*, 9 App. Cas. 117. [6] [1896] A. C. 348, at p. 365.

[7] *The Queen* v. *Robertson*, (1886) 3 M. R. 613. Contrast Sir J. Thompson, *Provincial Legislation*, 1867–95, pp. 927, 930.

health is felt to be local, inasmuch as a Bill for vaccination was not in 1869 proceeded with in the Dominion Parliament.[1]

(*y*) *Municipal Institutions*

The extent of authority given to the provinces by this subsection has now definitely been determined[2] as confined only to the powers expressly given to the legislatures by other headings. The power is one to constitute bodies, not to give these bodies all the wide authority which might have been granted before federation by the provinces.

Of the other powers of the Canadian Parliament, the most disputed has been that of copyright, and that only because of the question whether a Dominion Act, in virtue of the Constitution Act, can repeal legislation on copyright existing by Imperial Act before 1867, a question clearly decided in the negative.[3]

It seems now clear that legislation under the enumerated powers of the Parliament can be made to apply to one locality only, if thought by the Parliament to be necessary there for the peace, order, and good government of Canada, and indeed this is obvious, for as the provinces cannot legislate on the enumerated topics, there might else be a failure of legislation.[4] In regard to the general power, it must clearly be used as such, and must not intrude upon matter or sub-

[1] *House of Commons Debates*, 1869, p. 64; Lefroy, op. cit., pp. 654–661. Cf. Sir O. Mowat's withdrawal in 1897 of his Bill as to the employment of children; Biggar, ii. 660, 661.

[2] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348, at pp. 363, 364. Cf. *Cooey* v. *Municipality of County of Broome*, 21 L. C. J. 182, at p. 186. This decision overrules many older dicta (e. g. Strong C.J. in 24 S. C. R. 150, 151); see Lefroy, op. cit., pp. 706, 398, note 1, 43–9, 54–61.

[3] See Part II, chap. iii; *Provincial Legislation*, 1867–95, pp. 30–58[d], 1281–1313; Quick and Garran, *Constitution of Commonwealth*, pp. 593–6.

[4] Lefroy, op. cit., pp. 567 seq.; Quick and Garran, op. cit., pp. 513, 514; Harrison Moore, *Commonwealth of Australia*,[2] pp. 284, 285; Loranger, *Interpretation of the Federal Constitution* (Quebec, 1884), maintained that unless an Act affected all the provinces it was merely local and *ultra vires* the Dominion.

stance local or provincial.[1] The Dominion Parliament cannot make a provincial subject its own by legislating for several provinces. Instances of the use of the general power may be seen in the Act 31 Vict. c. 76, authorizing the examination by any Court in the Dominion of witnesses or parties in relation to civil or commercial matters pending before British or foreign tribunals,[2] and the *Temperance Act*, 1878.

Provincial Legislatures are all (save where the Constitution Acts specially provide) on the same footing as regards authority,[3] and have no powers save those expressly given in the Act of 1867.[4]

One essential characteristic of Provincial Legislatures is their local limitation to matters in the province. In the *Goodhue* case[5] it was held by Strong V.C. that as the Provincial Legislature could only affect such property when in its jurisdiction and since some of the grandchildren of testator were domiciled in England, the Legislature could not bar the rights of these grandchildren, as the property was notionally in England. For this doctrine there can be no reasonable defence. There can be no doubt that the Legislature *can* regulate whatever is physically in Ontario, or what is recoverable there (e.g. a debt), and cases which merely assert that laws are not to be interpreted e.g. to levy a duty in case of deaths of persons domiciled elsewhere (as in the case of the British legacy duty) unless it is expressly so stated, have no relevance to the issue.[6] Doubt is of course possible as to whether any given asset is in the province, as in the case of shares in a bank outside.[7] Otherwise the power to

[1] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348; Lefroy, pp. 314 seq.; Canada *Sess. Pap.*, 1884, No. 30, p. 27.

[2] (1872) 16 L. C. J. 140.

[3] Lefroy, pp. 705–9.

[4] Lefroy, pp. 710 seq.

[5] 19 Gr. 366.

[6] See the discussion in *Lovitt* v. *The King*, (1909) 43 S. C. R. 106, and cf. *Winans* v. *Attorney-General* (No. 2), [1910] A. C. 27; *Jones* v. *The Canada Central Railway Co.*, (1881) 46 U. C. Q. B. 250 (where it was held that the Ontario Legislature could deal with a company, though bonds of it were owned in England, and were not domiciled in the province within s. 92 (13)).

[7] Cf. *Nickle* v. *Douglas*, 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.

affect all locally within is as clear [1] as the lack of power to affect what is without, for, as the doctrine *mobilia sequentur personam* is not to be taken as depriving the provinces of legislative power over goods inside the province in fact, but outside in law, so also it does not confer upon them a power to affect goods outside the province because a testator is domiciled in the province; [2] Manitoba by Acts, 1910, c. 20, and 1911, c. 26, has recognized this fact and amended its death duties Act so as not to claim to affect property situated outside Manitoba, but taxes property in Manitoba on a scale determined by the amount outside.

There seems to be no real ground for the view expressed by Todd [3] that under the powers in s. 92 the Provincial Legislatures can legislate so as to affect the exclusive powers of the Parliament in s. 91. The cases merely show that a Provincial Act may deal with matters which might come under Dominion control in a different aspect: in *Bennett* v. *The Pharmaceutical Association of the Province of Quebec* [4] it was held that it was valid to require qualifications on the part of sellers of drugs and medicines, though it might interfere in some degree with the sales of drugs and medicines in the provinces.

The principles of interpretation which can be derived from the judgements of the Privy Council are simple, and resolve themselves into the view that the Act must be so interpreted as not to make the provisions contained in it of no effect or directly contradictory. Thus with regard to the reservation to the provinces of civil rights the principle is not to allow the fullest play to these rights and restrict the powers of the Federal Parliament accordingly, which is the view taken by the High Court of the Commonwealth, but to allow the Federal Parliament full power to regulate the matters entrusted

[1] Lefroy, op. cit., pp. 752–70. Cf. *Cowan* v. *Wright*, (1876) 23 Gr. 416; *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A. C. 189, overruling *Clarkson* v. *The Ontario Bank*, 15 O. A. R. 166, at p. 190.

[2] *Woodruff* v. *Attorney-General for Ontario*, [1908] A. C. 508; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at pp. 584, 585.

[3] *Parliamentary Government in the British Colonies*,[2] p. 436.

[4] (1881) 1 Dor. Q. A. 336; *ex parte Laveillé*, 2 Steph. Dig. 445, at p. 446; Lefroy, op. cit., pp. 456 seq.

to it, though such regulation may trench incidentally on civil rights : thus if bankruptcy is a part of the federal power it must necessarily in many ways interfere with civil rights,[1] but at the same time it is not illegal for a province to extend the period within which a company may perform its obligations because it thus enables the company to escape from the operation of the federal bankruptcy law for the time being.[2] It is clear that in Australia the case would have, under the present principles of interpretation, been decided in the opposite manner.

In testing the validity of a Provincial Act, the first step is to see if it falls under any of the heads given in s. 92, and if that is *prima facie* the case, to see whether or not the power to deal with the matter is exclusively the power of the Federal Parliament under s. 91 of the Constitution, in which case the Provincial Act loses validity. Then there are many cases where the province and the Federal Parliament have power in different aspects : to quote a case suggested by Lord Watson,[3] the province might legislate to prevent the sale of arms in the province, or their being carried by young persons, but the general traffic in arms, the carrying of arms with seditious intent, would fall under the powers of the Dominion. Of course, when both Acts are equally valid considered by themselves, and neither is invalid in itself, the result is that if they cannot be construed together the Provincial Act must give place, not as being in itself invalid, but as the law of the inferior body, a principle which, it is important to note, is not, as in the case of the Commonwealth, laid down in the constitution, but is a mere rule of law adopted by the Privy Council, and binding on all the Courts.[4] Parliament in Canada has recognized on

[1] *Cushing* v. *Dupuy*, 5 App. Cas. 409, decides that the Dominion Parliament could provide, by Act 40 Vict. c. 41, s. 28, that the decision of the Court of Insolvency should be final, and that such a provision did not interfere with the powers of the Quebec legislature under s. 91.

[2] *L'Union St. Jacques de Montréal* v. *Belisle*, 6 P. C. 31.

[3] In the Prohibitory Liquor Laws case, 19 L. N. 139 ; [1896] A. C. 348, at p. 362.

[4] [1896] A. C. 366 ; *La Compagnie hydraulique de St. François* v. *Continental Heat and Light Co.*, [1909] A. C. 194 ; Lefroy, op. cit., pp. 526 seq.

several occasions that this supreme power should not be exercised without good cause, and in incorporating a company has therefore refused to insert clauses inconsistent with a previous local incorporation.

It is not, however, possible to hold that a Dominion Act must legislate for Canada as a whole : it is clear law that it is enough if the legislation be for the peace, order, and good government of Canada even if it have local effect, as, for example, in the case of the establishment of a court for one province only.[1] This is clear as regards the enumerated powers, but as regards the general power there is the limitation that any such legislation must not deal with ' any matter which is in substance local or provincial, and does not truly affect the interests of the Dominion as a whole '.[2] Mr. Harrison Moore[3] suggests that the same principle will apply with still greater force to Australia.

The incidental power of legislation on the matters reserved to the provinces is recognized in the proviso to s. 91, which applies in the true interpretation to all the classes of laws enumerated in s. 92, but it is to be restricted to necessarily incidental legislation only.[4] Conversely the local legislature cannot, on the ground that s. 92 (16) gives them power over all local matters, deal in any way with matters included in the long list in s. 91 as within the exclusive power of the Dominion.[5]

Neither province nor Dominion can of course by colourable legislation evade the restrictions imposed by ss. 91 and 92 :

[1] *McCuaig and Smith* v. *Keith*, (1879) 4 S. C. R. 648 ; 1 Cart. 557. See dicta in Lefroy, pp. 567–81.

[2] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348 ; cf. *L'Union St. Jacques de Montréal* v. *Belisle*, 6 P. C., at p. 36 ; *Fielding* v. *Thomas* ([1896] A. C. 600), per Lord Herschell (cited in Lefroy, *Legislative Power in Canada*, p. 575, from the shorthand report).

[3] *Commonwealth of Australia*,[2] pp. 285, 286.

[4] See *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348, at p. 359 (correcting *Citizens' Insurance Co. of Canada* v. *Parsons*, 7 App. Cas. 96, at p. 108) ; *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31 ; *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A. C. 189 ; *Montreal Street Railway Co.* v. *City of Montreal*, 43 S. C. R. 197, at pp. 228, 229.

[5] *Quirt* v. *The Queen*, 19 S. C. R. 510, at p. 516 ; Lefroy, op. cit., pp. 647–52.

the Courts regard the substance, not the form of legislation.[1] Neither legislature can amend or repeal an Act passed by the other, and the Provinces of Ontario and Quebec cannot repeal any Act of the old Province of Canada which it could not since 1867 enact.[2]

Finally, it may be noted that the Privy Council is clear that regulation does not permit prohibition. This they held in the *Corporation of Toronto* v. *Virgo*[3] and repeated in the Prohibitory Liquor Laws case.[4]

§ 5. The Disallowance of Provincial Acts[5]

It is expressly provided by the *British North America Act*, s. 90, that the provisions of the Act relating to the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, shall extend and apply to the legislatures of the several provinces as if these provisions were here re-enacted and made applicable in terms to the respective provinces and to the legislatures thereof, with the substitution of the Lieutenant-Governor of the province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, and of one year for two years, and of the province for Canada. It is certain that this is a confused and muddled way of expressing the intention as to the disallowance of Acts, and it has a somewhat curious result. The provisions regarding the Governor-General give him the right to assent or reserve, subject in theory to instructions, and to withhold assent. If a Bill is assented to it must be sent home, and it is then possible to disallow it by an Order in Council within two years after the receipt of the Bill by the Secretary of State, while a

[1] Lefroy, op. cit., pp. 372–92.

[2] Ibid., pp. 365–71.

[3] [1896] A. C. 88, at p. 93.

[4] [1896] A. C. 348, at p. 365.

[5] This power affects in a very substantial manner the interpretation of the Dominion Constitution; see *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at p. 587; *Angers* v. *The Queen Insurance Co.*, 22 L. C. J. 307, at pp. 309, 310; Ritchie J. in *Severn* v. *The Queen*, 2 S. C. R. 70, at p. 102; Strong J. at pp. 108, 109; Lefroy, op. cit., at pp. 185 seq. The abolition of the Dominion veto was demanded by an Inter-provincial Conference at Quebec in 1887; Biggar, *Sir Oliver Mowat*, ii. 507.

reserved Bill ceases to have any validity if not assented to by Order in Council within two years from the date when it was presented for the royal assent to the Governor-General. These provisions substitute the Governor-General for the Queen in the disallowance of Acts and in the giving of instructions for reservation and so forth.

A curious dispute soon developed itself as to the sense of the provisions regarding the Governor-General. Sir John Young, in a dispatch of March 11, 1869,[1] asked the Imperial Government whether he was right in assuming that in the case of Provincial Acts he should not send them home for the signification of the royal pleasure, but should deal with them on the advice of his ministers. In reply, Lord Granville informed him in a dispatch of May 8, 1869, that he was at liberty to follow the advice of ministers as a rule, whether or not he concurred in it as regards Acts which he deemed objectionable as illegal or unconstitutional, but in the case of Acts which he thought gravely unconstitutional, or which would have required reservation under the royal instructions in force for the Dominion, he should, even against the advice of ministers, refer home for guidance. This ruling was accepted by the Canadian Government at the time, and a copy of the dispatch was sent round with a copy of the relevant part of the royal instructions to all the Lieutenant-Governors, as a guide to them in the discharge of their functions.[2] On the other hand, in a letter from the Privy Council Office of December 13, 1872,[3] with regard to the education dispute in Canada, it was observed by the Lord President that the power of confirming or disallowing Provincial Acts was vested in the Governor-General of Canada acting under the advice of his constitutional advisers, and that Her Majesty in Council had no jurisdiction therein. This clearly pointed to a different conception of the position from that laid down in the Imperial dispatches, which was

[1] Canada *Sess. Pap.*, 1870, No. 35, pp. 3, 4; *Provincial Legislation*, 1867–95, pp. 62–4; Lefroy, op. cit., pp. 193 seq.

[2] Canada *Sess. Pap.*, *l.c.*, pp. 25–7.

[3] Ibid., 1876, No. 116, p. 85.

reiterated in a dispatch of June 30, 1873,[1] with regard to the disallowance of the New Brunswick Education Act, and a dispatch of December 31, 1874, as to land legislation of Prince Edward Island.[2] There it was clearly laid down: 'This is a matter in which you must act on your own individual discretion and on which you cannot be guided by the advice of your responsible ministers.' Naturally, so interesting a divergence of view at home attracted attention in Canada, and accordingly a committee of Council considered the question and decided on March 8, 1875, that the act of the Governor-General in this regard was essentially one to be done on ministerial advice as all his other acts were. But this opinion was not accepted by Lord Carnarvon, who in a dispatch of November 5, 1875,[3] was still of opinion that the matter should be left vague. He instanced the rules then laid down for the exercise of the prerogative of mercy in Australia, and then said that the Governor-General should consult his ministers and then give his own individual decision on the point, as he did in cases of pardons. He went on to add:

> The constitutional remedy for any prolonged difference of opinion between the Governor-General and his advisers would be the same in this as in any other case of a similar nature. Holding, as I have already explained, the opinion that the constitution of Canada does not contemplate any interference with provincial legislation on a subject within the competence of the local legislature by the Dominion Parliament—or, as a consequence, by the Dominion ministers—I assume that those ministers would not feel themselves justified in retiring from the administration of public affairs on account of the course taken by the Governor-General on such a subject, it being one for which the Dominion Parliament cannot hold themselves responsible, although it may demand to know what advice they gave.

Then Mr. Blake gave the whole subject his careful consideration. In a report of December 22, 1875,[4] he contro-

[1] Canada *Sess. Pap.*, 1874, No. 25, p. 13; 1876, No. 116, pp. 84, 85.

[2] Ibid., 1885, No. 34, p. 368. [3] Ibid., 1876, No. 116, pp. 83, 84.

[4] Ibid., pp. 79, 83. The correspondence is also printed in *Provincial Legislation*, 1867–95, pp. 65 seq.

verted the argument of the Secretary of State : he pointed out that from their local character the Acts were essentially those which did not require intervention on Imperial grounds : and he laid stress on the fact that as the Queen could only disallow by Order in Council so the Governor-General must disallow by that means : if ministers wished to disallow they should resign if they wished to do so while the Governor refused, and conversely, if he desired to disallow he must obtain a Cabinet which would agree to his proposed action. The case of pardon was essentially different, and no doubt might include serious Imperial interests. The report was approved on February 29, 1876, and was forwarded on April 6, 1876, to the Secretary of State. In a reply of June 1, 1876, the Secretary of State intimated that in his view the use of the term Governor-General in s. 90, and not Governor-General in Council, was a sign of throwing personal responsibility on the Governor-General : otherwise the whole effect of the reservation of independent power to the provinces would be gone if the Dominion could deal as it pleased with their legislation. The matter could only be decided by the Privy Council. To this Mr. Blake replied that the omission of the words ' in Council ' was for brevity and to avoid repetition, for else the power to disallow would be given to the Governor-General in Council. As to the argument of substance, it might at best be an argument for the alteration of the law, but even as that it was not conclusive, for the provinces were well able to punish any conduct infringing on their interests by the Dominion Government, and this was a much better safeguard against unsatisfactory legislation than an independent judgement on the part of the Governor-General, or his acting on instructions from home. The Secretary of State in a dispatch of October 31, 1876, still maintained his view, and suggested that if the Governor-General consulted his ministers he would be acting under their advice as laid down in the Lord President's letter, though not according to their advice. In reply, Mr. Blake declined to accept the view that a man acted under advice when he rejected it, and pressed for the recognition that in

law as in spirit the constitution requires the Governor-General to act on ministerial advice. But he hoped that there would, as a result of the correspondence, be little chance of friction.[1]

Todd,[2] in his review of the case, thinks that the real sense of Governor-General is Governor-General in Council, and he quotes s. 54, where the recommendation of Money Bills is given to the Governor-General, as negativing the idea that the words should be read as giving a personal discretion. He urges in favour the opinion of Sir John Macdonald,[3] who asserted that all the powers of the Governor-General must be done with the advice of his Council, whether formally declared in the Act to be done by him or by him in Council. But this argument is a mistake : the rule cannot be made absolute, or if it were made absolute it would defeat the essence of responsible government—the fact that the Executive Council itself holds office at the pleasure of the Crown in the person of the Governor-General, and that this discretion cannot be fettered : so that the only conclusion which can be drawn is that each section must be examined for itself, to see if by constitutional practice it confers an independent authority or not. Much more effective, in truth, is the fact that the power has always been exercised in Council, and that no case of dispute has yet been known to occur where the Governor-General attempted to disallow an Act of his own motion. Todd's third argument, that since the Queen in Council has no authority as declared by the Lord President, the Governor-General as an Imperial authority cannot have any, is quite invalid. It might well have been intended that the Governor-General should have been the vehicle of Imperial authority, just as, in fact, in

[1] Canada *Sess. Pap.*, 1877, No. 89, pp. 449–58.

[2] *Parliamentary Government in the Colonies*,[1] pp. 340 seq.

[3] *Parl. Pap.*, C. 2445, p. 109. So Higinbotham J. in *Attorney-General* v. *Goldsbrough*, 15 V. L. R. 638, at p. 647 (cf. also Tasmania *Interpretation Act*, 1906; Union *Interpretation Act*, 1910). The statement is not, however, strictly correct; it is a matter of constitutional practice. Cf. Pope, *Sir John Macdonald*, ii. 296, 297, for his views on disallowance of provincial legislation. He was really in favour of a union not federation.

New Zealand the Governor alone could *de facto* disallow Provincial Acts for Imperial grounds as only three months were available for action.[1]

The truth is that these curious points do not arise from the deliberate framing of an Act : they arise here because the framers of the clause intended to give the power to the Governor-General without thinking out very closely in what way he would exercise it, but probably being very far from imagining that he would act on ministerial advice : they did not observe that the wording left it necessary for the disallowance to be done in Council. Now an Order in Council in England and in these cases was, and is, a formal means of doing what could be done by dispatch, and an order is made not on the advice of the Cabinet but on a request by a departmental minister, and the Council may not contain a single minister at all, as any three councillors suffice for a Council. The Council, however, in the case of Canada, brought in the technical sense of a Governor-General acting in Council and with the advice of ministers, and, though it was rather a technical result, it was, strictly speaking, correct.

At the same time, it is impossible to ignore the fact that the decision in effect cancelled much of the security of the provinces. It was evidently the view of Lord Carnarvon and of his department that the plan of the constitution did not intend that any acts of the provinces should be disallowed unless illegal or unconstitutional. They evidently considered, and it seems to have been held, that the Imperial Government would still have retained a control over the Provincial Acts. In 1874 it was suggested by the Secretary of State that the Governor-General need not be very anxious about obtaining the views of his ministers on the question of a Prince Edward Island Act of 1874 to settle the land question : but the Governor-General referred the matter to ministers, and in due course disallowed it on their

[1] Cf. also Harrison C.J. in *Leprohon* v. *City of Ottawa*, 40 U. C. Q. B. 478, at p. 490 ; 1 Cart. 488, at p. 647 ; Taschereau J. in *Lenoir* v. *Ritchie*, 3 S. C. R. 575, at p. 624 ; Lefroy, *Legislative Power in Canada*, p. 202.

advice.[1] Though in that case the Secretary of State told certain petitioners that the matter was one for the Governor-General, in answering a petition in 1875 regarding a second Act he merely said that the Secretary of State had not felt at liberty to interfere with the course taken by the Governor-General.[2] In the matter of the complaints of the Presbyterians against the Ontario legislation as to the union of the churches and the college at Kingston the Secretary of State took no action,[3] but in the case of the complaint of Mr. Butt, M.P., in 1878, regarding the Act of New Brunswick regarding Orangemen, the Secretary of State[4] still used language which indicated that Her Majesty's Government might interfere in a very exceptional case. And probably the view still then was that the Governor-General had some personal discretion, though of course it might be that the Secretary of State only meant that a matter might be so grave that the Governor-General might change his ministers rather than allow an Act which was obviously wrong or disallow an Act obviously justifiable.

At any rate, the modern practice which has grown up is perfectly satisfactory so far as Imperial interests are concerned: the Dominion Government have at the request of the Imperial Government disallowed a whole series of British Columbia Acts dealing in a hostile spirit with the Japanese and other Asiatic races, while the Lieutenant-Governor disallowed an amusing Act passed in 1907 wherein the omission of a 'not' rendered the Act of precisely no use, while the Act passed in 1908 had the 'not' restored, but was ultimately disallowed after being held *ultra vires* by the Courts of the province.[5] Again, in deference to the

[1] *Parl Pap.*, C. 1351, pp. 42, 54–61.

[2] Ibid., pp. 50, 62–4.

[3] Canada *Sess. Pap.*, 1877, No. 89, pp. 435–47.

[4] *Parl. Pap.*, H. C. 389, 1878. Lord Stanley referred home for instructions as to whether he could legally allow the Jesuit Estates Act of Quebec in 1888 to remain in force; see Hopkins, *Sir John Thompson*, p. 143; *Provincial Legislation*, 1867–95, pp. 395 seq.

[5] See British Columbia *Sess. Pap.*, 1908, D. 15, 43; G. 59; 13 B. C. 370; *Canadian Annual Review*, 1907, pp. 382 seq.; 1908, pp. 540 seq.; above, p. 689, n. 2.

views of the Imperial Government, an Ontario Act of 1908 which *inter alia* made it illegal for a chartered accountant to describe himself as such in the province was disallowed, though it was re-enacted promptly in 1910 (c. 79) in identical terms, was disallowed and reappears on the statute books in 1911. A British Columbia Act was also criticized on this ground by the Imperial Government in 1905.[1]

The Dominion control is in the main exercised through formal disallowance rather than by withholding assent or reservation, and no detailed instructions for reservation have so far been issued, though the Lieutenant-Governor of Manitoba asked for them in 1876. The need for reservation is not great in a country where there are no long distances in time between the provinces and the head-quarters of government, and it would seldom be convenient for the Lieutenant-Governors to refuse assent straightway. At any rate, the Lieutenant-Governors of Ontario and Quebec seem never now to refuse assent, and very rarely to reserve; indeed, in Ontario disallowance has been unknown. In Nova Scotia, on the other hand, the Lieutenant-Governor five times in the years 1874–9 refused his assent, and in New Brunswick the same course was taken in 1870, 1871, and 1872 by one Lieutenant-Governor, and in 1877 and 1879 by another. Todd[2] obtained from the Lieutenant-Governor of Nova Scotia his explanations of his action, which was due to the desire of ministers to avoid infringing upon the sphere laid open to them by the *British North America Act*. On the Bills having passed both Houses, there were found, on close examination, serious defects which would have rendered it undesirable for him to assent. Otherwise they would have been disallowed, an inconvenient proceeding, while reservation would have meant throwing on the Dominion authorities a duty really incumbent on the Provincial Government of seeing that it did not really transgress the limit pointed by the constitution. Thus in 1873, when the Lieutenant-Governor of Ontario on advice reserved two

[1] See *Provincial Legislation*, 1904–6, p. 159; above, p. 708.

[2] *Parliamentary Government in the British Colonies*,[1] pp. 395, 396.

Bills, the Dominion Minister of Justice reported that the province should have accepted the responsibility of deciding whether the Acts, which were *intra vires*, should become law, and no action was taken to bring them into operation.[1] In 1878 the Lieutenant-Governor of Quebec reserved a Railway Bill against the advice of his ministers, and then dismissed the ministers : the new Premier advised him to reserve, not to withhold assent, and the Bill never became law.[2] But certainly the normal modern practice is assent followed by disallowance : in 1908 no attempt was made by the Lieutenant-Governor of British Columbia to decline to assent to the anti-Japanese law, though its disallowance was certain, and in 1907 he had declined his assent.[3] The reason for this is probably the feeling which animated Mr. Blake in 1876–7, that the legislation of Canada *vis-à-vis* the Imperial Government should be completed in Canada, and then if need be disallowed, and not reserved by a Governor-General or refused assent by him. Still there is no reason why reservation or refusal of assent should not be used in exceptional cases, and there is certainly no convincing ground for the view of Todd that refusal of assent should only be done on ministerial advice ;[4] on the other hand the view of Sir J. Macdonald that it should never be done on ministerial advice is somewhat too sweeping a dictum.

The mode of disallowance was prescribed with much solemnity in 1868. It was agreed after full consideration by the Privy Council of Canada that the Minister of Justice should report as quickly as he could on Bills to which no objection could be taken, and send in separately and in detail reports on Acts which seemed open to objection as (1) altogether illegal or unconstitutional, (2) as being partly illegal or unconstitutional, (3) as clashing with the legislation

[1] Ontario *Sess. Pap.*, 1874, Sess. 1, No. 19. So also in 1892 as regards Prince Edward Island ; see *Provincial Legislation*, 1867–95, p. 1225, and cf. pp. 77, 104, 763, 807, 915, 1018, 1045, 1200, 1201.

[2] Quebec *Legislative Assembly Journals*, 1877–8, pp. 230, 272. A new Act, 41 & 42 Vict. c. 3, was substituted.

[3] *Canadian Annual Review*, 1907, pp. 612, 613.

[4] See below, Part V, chap. i.

of the Dominion where there was concurrent power, and (4) as affecting the interest of the Dominion generally. This principle was laid down finally on June 9, 1868, and in substance the procedure has not been changed : the report of the Minister of Justice is the important part of the case.[1]

In strict constitutional theory it may be that the Dominion should have contented itself with the disallowance of unconstitutional or illegal laws, as Lord Carnarvon argued with so much energy in 1873–5 :[2] in practice, it did nothing of the sort, but decided to supervise very closely the provincial legislation, especially when the correspondence with Lord Carnarvon ended in the virtual abdication by the Colonial Office of the view that in case of doubt the Secretary of State should be applied to as having authority to direct the Governor-General. In many cases Acts have been allowed to remain in operation, though they are clearly in part *ultra vires*, if the rest can be separated and therefore allowed, while the Legislature has been asked to take steps to amend the part which was invalid, or sometimes, if the Dominion was able to legislate, it has passed legislation not exactly to validate, for that could not be done if the Act were *ultra vires*, but to secure the same effect as was aimed at in the Provincial Act.

The examples of disallowance are decidedly numerous, though perhaps fewer than might be expected when the prodigious legislative output of the provinces is taken into account : thus a return made for the use of Todd[3] showed

[1] Canada *Sess. Pap.*, 1869, No. 18 ; 1870, No. 35, pp. 6, 7 ; the reports are published up to 1906, and are here cited as *Provincial Legislation*. As legal opinions as to constitutionality and so forth they are valuable, though not of course authoritative ; cf. observations on this point in 39 S. C. R. 405, at pp. 413–15, by the C.J. ; Blake in Lefroy, op. cit., p. 141, note.

[2] Cf. Lefroy, pp. 197, note 4, 198 ; Adderley, *Hansard*, ser. 3, clxxxv. 1319 ; Mills, Canada *House of Commons Debates*, 1889, p. 876.

[3] *Parliamentary Government in the Colonies*,[1] p. 271. Up to 1882 the total number was only thirty-one ; out of 6,000 Acts for 1883–7, fifteen Acts were disallowed ; see Canada *Sess. Pap.*, 1882, No. 141 ; 1885, No. 29 ; Munro, *Constitution of Canada*, pp. 260, 261. Up to 1906, 86 were disallowed : Ontario 8, Quebec 4, Nova Scotia 6, New Brunswick 1, Manitoba 27, British Columbia 40, Prince Edward Island none. In Ontario 3 were

that up to 1878 inclusive, out of 4,606 Acts passed by the seven provinces existing up to that date there had been disallowed only three in Ontario, two in Quebec, four in Nova Scotia, six in Manitoba, and twelve in British Columbia, while in Prince Edward Island and in New Brunswick no Acts had been disallowed. The proportion did not, however, diminish after that date, and in one respect it may be said to have been substantially increased, for it is in the administration of Sir John Macdonald that we find the clearest examples of the interference by the Dominion with Provincial Acts simply because they transgressed Dominion policy: with the advent of the Ministry of Sir Wilfrid Laurier, which was returned to power, for one reason among others, owing to the attempt of the Conservative Government to coerce the Province of Manitoba, the practice of disallowing Acts on other than legal and constitutional grounds, or on grounds of wide public and Imperial policy, may be said to have come almost to a stop.

Some of the cases of the exercise of the power have been proved subsequently to have been based on quite inadequate legal grounds; for example, the absurd doctrine of the Provincial Legislature as a municipal council resulted in the disallowance of the Act of Ontario to define its privileges in 1868–9. The law officers of the Crown in England shared in the opinion as to that Act being *ultra vires*, and it was disallowed. But a Quebec Act of 1870 was not disallowed, and a subsequent Act of Ontario in 1876 was allowed to stand as being at any rate, if invalid, open to being overruled by the Courts, and in 1878 a decision in the Supreme Court of Canada[1] incidentally affirmed the legitimacy of such Acts. Cases of similar action regarding the pardon power and the executive government have been seen above.[2] This principle of leaving to the Courts the decision of such cases was

reserved and not assented to, 6 in Quebec, 2 in Nova Scotia (one assented to), 4 in New Brunswick (all assented to), 14 in Manitoba (5 assented to), 6 in British Columbia (5 assented to), and 5 in Prince Edward Island (3 assented to).

[1] *Landers* v. *Woodworth*, 2 S. C. R. 158, at p. 192.

[2] Cf. Biggar, *Sir Oliver Mowat*, ii. 509 seq.

adopted by the Dominion in 1871 in the famous case of the Ontario Goodhue Estate Act of that year to confirm and validate the settlement of property under a will, but at variance with the intention of the testator. The Act was petitioned against, but the Dominion left it to operate, though the Ontario Court of Error and Appeal decided later that it was, though not *ultra vires*, inoperative on account of the defects and omissions of its drafting.[1] In 1876 also they consented to leave in operation the excellent Act (c. 28) passed by the Province of Manitoba in that year to get rid of the needless and useless Second Chamber which the Dominion Parliament had created for it in 1870. The Lieutenant-Governor pointed out what he thought legal and other objections to it, arising from the curious wording of the Imperial Act of 1871, but the Dominion Government were then of opinion that it would be contrary to the spirit in which the power of disallowance had been exercised to interfere with the operation of the Act. They suggested, however, that it would be for the Legislature of Manitoba, if necessary, to petition the Crown for the validation of the Act by Imperial legislation.[2] This was not done, nor does it seem to have been necessary, and in 1891 (c. 9) New Brunswick, and in 1893 (c. 21) Prince Edward Island removed their second Houses, though in the case of the latter province, in which the Second Chamber had been since 1862 elective, a compromise was made by which half the members were elected on a property basis, and half not. In 1892 a similar Bill was reserved and not assented to, because on principle it should not have been reserved. During the same period the Courts of Canada declared the powers of the legislatures absolute as to choice of methods within their own province,[3] and the Supreme Court of the Dominion actually laid it down in a judgement[4] that the assertion of

[1] 19 Gr. 366; 1 Cart. 560.

[2] Canada *Sess. Pap.*, 1877, No. 89, pp. 148–51.

[3] Cf. *re Goodhue*, 19 Gr., at pp. 386 (per Draper C.J.), 418 (per Spragge C.), 452 (per Strong V.C.); *Cowan* v. *Wright*, 23 Gr., at p. 623 (per Blake V.C.), and see 4 O. A. R., at p. 100; 2 S. C. R. 70, at p. 81.

[4] *Severn* v. *The Queen*, 2 S. C. R. 70, at pp. 96 (per Richards C.J.), 131 (per Fournier J.). Cf. Canada *House of Commons Debates*, 1889, pp. 822, 823.

the prerogative right of disallowance by the Federal Government would always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act was so clearly beyond the powers of the local legislature that the propriety of interfering would be recognized at once. They also admitted that the power could even be applied to a law over which the Provincial Legislature had complete jurisdiction, but it would always be a difficult matter for the Federal Government to substitute its opinion instead of that of the legislative assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the provinces. There were, however, even in this period cases of disallowance of Acts on other than legal or constitutional grounds, or the withholding of the assent to Bills which had been reserved, but these were mainly in respect of enactments of British Columbia [1] and Manitoba,[2] which stand in a peculiar position to the more settled provinces of the east, especially as regards land surveying and the regulation of the legal profession. One interesting case arose as regards Quebec; the Lieutenant-Governor assented in 1877 inadvertently to a Bill which he was assured had duly passed both Houses: as a matter of fact it had done so, but had only been read twice in the Assembly, and on finding out the error the Dominion Government was asked by the Lieutenant-Governor to take steps to disallow the Act. Mr. Blake, however, as Minister of Justice, declined to comply with this request, pointing out that the assent, having been improperly given, was mere nullity, and suggesting that the disallowance of a nullity would be improper, though the Quebec Legislature might pass, if it liked, an Act next session declaring that the Act of the previous session was void: it did not do so, but it was agreed not to print the Act among the Acts of the session, and so it never appeared as an Act at all on the statute book.[3] In 1876, however, a Manitoba Act (38 Vict. c. 37) was disallowed because it had not been duly published

[1] Canada *Sess. Pap.*, 1877, No. 89, p. 174.

[2] Ibid., pp. 179, 230, 307.

[3] Ibid., 1879, Nos. 19 and 26.

in the *Gazette*, and was not considered to be in force in the province.

Under Sir John Macdonald's regime we find a vigorous policy of interference with provincial laws. The facts in McLaren's case were as follows: he had constructed on a non-floatable stream in Ontario certain works of which he claimed to be seised in fee-simple, for carrying logs to their destination. One Caldwell, who carried on the same business higher up than McLaren, claimed to be entitled to use the stream for the purpose defined in chapter 115 of the *Revised Statutes*, which provided that all persons might, during the spring, summer, and autumn freshets, float sawn logs and other lumber rafts and craft down all streams. McLaren obtained an injunction from the Court of Chancery [1] against Caldwell on the grounds that the expression 'all streams' in the *Revised Statutes* merely referred to streams which were naturally floatable, not to those made floatable by artificial means. The decision was wrong, as was decided by the Privy Council in 1884,[2] but in the meantime, while the question was moving slowly through the Courts, as the Court of Appeal [3] of Ontario reversed the decision of the Court of Chancery, and the Supreme Court of the Dominion [4] restored it, to be reversed finally by the Privy Council, the Ontario Legislature passed an Act in 1881 in which it compelled the owner of such improvements as those erected by McLaren to permit their use by others on payment of a reasonable toll to be fixed by the Lieutenant-Governor in Council. Besides, the Act declared that the provisions of the Act in the *Revised Statutes* extended to all streams and not merely to floatable streams. The Act was petitioned against, and it was disallowed on the grounds that, in the first place, it deprived an owner of his property without adequate compensation, by making him a mere toll-keeper if he wished to get anything for the use of it by others, and secondly, that it reversed the decision of a competent Court.

[illegible], pp. 144 seq.; Biggar, *Sir John Macdonald*, i. 338–45.

[1] 6 O. A. R. 456.

[2] 9 App. Cas. 392.

[3] 8 S. C. R. 435.

the Court of Chancery of Ontario, by declaring the meaning of the Act of 1881 to be and always to have been that which it ascribed to it.[1] Re-enactments of the law in 1882 and 1883 met with disallowance. This utterly indefensible action was protested against by the Government of Ontario, which asserted with vigour, clearness, and much dignity that it was no part of the duty of the Dominion to interfere with the operation of a Provincial Act within its legitimate activity. Finally in 1884 the Act was allowed to stand, the rates of payment being fixed by the county judges.

The next series of cases is one more justifiable: it was necessary in connexion with the contract for the construction of the Pacific Railway to give a guarantee to the company, a guarantee ratified by the Legislature of Canada in the session of 1880–1, that the Government would not permit for twenty years the construction of any line of railway south of the Canadian Pacific Railway from any point at or near the Canadian Pacific Railway, except such line as should run south-west or to the westward of south-west, or to within fifteen miles of latitude 49°. This agreement only referred in terms to lines authorized by the Dominion Parliament, but the Dominion Government put upon it the meaning that it was not to allow any line, which was no doubt the sense intended. At any rate, they opened the game by disallowing in 1882 the Act (44 Vict. c. 37) of Manitoba, incorporating the Winnipeg South-Eastern Railway Company, despite the protests of that Legislature: they then disallowed in succession the Acts of Manitoba to incorporate the Manitoba Tramway Company (44 Vict. c. 38), to incorporate the Emerson and North-Western Railway Co. (44 Vict. c. 39), and to encourage the building of railways in Manitoba (45 Vict. c. 30), on the ground that they were in conflict with the settled policy of the Dominion Government in regard to the direction and limits of railway construction in the territories of the Dominion. In 1886 they disallowed the Emerson Railway Act again (47 Vict. c. 68), and the Acts

[1] Canada *Sess. Pap.*, 1882, No. 149 a; *Provincial Legislation*, 1867–95, pp. 171 seq.

(47 Vict. c. 70 and amending Acts) incorporating the Manitoba Central Railway Company, and in 1887 the Act incorporating the Rock Lake, Souris Valley, and Brandon Railway Co. (48 Vict. c. 45),[1] the Acts regarding the Emerson (50 Vict. c. 54) and Central Railways (c. 1), and the Acts incorporating the Winnipeg and Southern Railway Company (50 Vict. c. 2) and the Red River Valley Railway Company (50 Vict. c. 4). In 1883 the Acts passed by British Columbia to incorporate the Fraser River Company (46 Vict. c. 26) and to incorporate the New Westminster Southern Railway Company (46 Vict. c. 27) were also disallowed in furtherance of the same policy. Naturally Manitoba was up in arms after this wholesale disallowance of the Provincial Acts merely because of a supposed federal interest, and the relations of the two Governments, which were destined in a few years to bring ruin on the Conservative party in the Dominion, assumed a serious aspect: the Dominion Government felt that it must attempt conciliation, and therefore arranged with the company to abandon the rights they had on consideration of certain further privileges conceded to them and ratified by an Act of Canada in 1888.[2] The dispute between the two Governments thus terminated, but it was to be renewed in the Courts, since in 1888 the Railway Commissioner of Manitoba, under the statute of 1888, which was no longer disallowed, commenced the construction of the Portage extension of the Red River Railway, and it became necessary to obtain the approval of the Railway Commission in Canada to secure the crossing by the new branch of the Pembina mountain branch of the Canadian Pacific line. The latter company at once intervened, and took the preliminary objection that the railway commissioner of the province had no authority to construct a line crossing the Pacific line, as the Act was illegal. It was argued by Mr. Blake for the company before the Supreme Court, that the Parliament of Canada had years before, by Acts, declared that a work crossing the Canadian

[1] Canada *Sess. Pap.*, 1882, No. 166; 1886, No. 81; *Provincial Legislation*, 1867-95, pp. 862 seq., 1082.

[2] See 51 Vict. c. 32; Canada *House of Commons Debates*, 1888, p. 1332.

Pacific line was a work for the general advantage under s. 92 (10) of the *British North America Act*, and that by the declaration the matter had been definitely removed from the jurisdiction of the Provincial Legislature and assumed to be within the cognizance of the Dominion, that the work proposed to be carried out was essentially a Dominion work, and therefore the whole of the Manitoban action was hopelessly illegal. The Supreme Court decided unanimously against this contention, holding that the Provincial Act was clearly valid, and that the railway constructed under it was entitled to cross the Canadian Pacific Railway subject to the approval of the Canadian Railway Commission, as provided by the Canadian Railway Act of 1888.[1]

On the other hand, there was no disallowance of the remarkable Act of the Province of Quebec in 1888 (c. 13), which granted the Jesuits a compensation for the estates which were taken from them by the annexation of Canada, and which they had vainly desired to have restored to them. There was much bitterness in Canada as to this action, and pressure was brought to bear on the Government to disallow, but the Government declined to do so, on the ground that it was essentially a fiscal matter for the decision of the Government of the province and its Legislature, a decision which naturally was probably in part due to motives of policy with regard to the treatment of Quebec.[2] Nor in 1890 was the Manitoba Act, which opened the long dispute as to education in that province, disallowed, but in that case it must be remembered that the provincial right to legislate was subject to positive limits, which could be enforced by the Courts, and which in the long run could be made good by the action of the Legislature of Canada under the powers conferred by the Act constituting the Province of Manitoba.[3]

But a change has certainly come over the spirit of the

[1] 12 L. N. 4, 5; Cass. Dig.[2] 487.

[2] Canada *House of Commons Debates*, 1889, pp. 811–910; *Provincial Legislation*, 1867–95, pp. 386 seq.; Hopkins, *Sir John Thompson*, pp. 116–36; Willison, *Sir Wilfrid Laurier*, ii. 40–6.

[3] See *Provincial Legislation*, 1867–95, pp. 947–9; Hopkins, op. cit., pp. 255–72.

Dominion as regards the legislation of the provinces within their own sphere. In 1901 Mr. D. Mills, as Minister of Justice, said in reference to the Ontario Insurance Act (1 Edw. VII. c. 21) :—[1]

The undersigned conceives that your Excellency's Government is not concerned with the policy of this measure. It is no doubt *intra vires* of the Legislature, and if it be unfair or unjust, or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the Legislature, and the Acts of the Legislature may be ultimately judged by the people. The undersigned does not consider, therefore, that your Excellency ought to exercise the power of disallowance in such cases.

In the same year, speaking with regard to certain *ex post facto* legislation (1 Edw. VII. c. 45) of British Columbia, he said :—[2]

The undersigned bases his refusal to recommend disallowance on the fact that the application proceeds upon grounds affecting the substance of the Act with regard to matters undoubtedly within the legislative authority of the province and not affecting any matter of Dominion policy. It is alleged that the statute affects pending litigation and rights existing under previous legislation and grants from the province. The undersigned considers that such legislation is objectionable in principle, and not justified unless in very exceptional circumstances, but your Excellency's Government is not in anywise responsible for the principle of the legislation, and, as has been already stated in the report with regard to an Ontario statute, the proper remedy in such cases lies with the Legislature or its constitutional judges.

A year later his successor, Mr. Fitzpatrick, in reporting on the same British Columbia legislation, wrote as follows :—[3]

It appears that litigation was pending between the Government and the petitioners at the time of the passing of the Act with regard to the petitioners' liability to pay these royalties, and no doubt a very strong case is made out by the petitioners in support of the view that the Legislature should have allowed the existing law to operate, and should not have undertaken to legislate so as to diminish or affect existing rights. The undersigned cannot help expressing

[1] *Provincial Legislation*, 1901–3, p. 4 (wrongly ascribed to Mr. Fitzpatrick). [2] Ibid., p. 46. [3] Ibid., p. 70.

his disapprobation of measures of this character, but there is a difficulty about your Excellency in Council giving relief in such cases without affirming a policy which requires your Excellency's Government to put itself to a large extent in the position of the Legislature, and judge of the propriety of its acts relating to matters committed by the constitution to the exclusive legislative authority of the provinces.

The principle has been well illustrated in two recent cases in Ontario, in both of which there was the question of the passing of Acts which took away a right claimed by private persons, and on which there was litigation. The former case involved a complicated question as to mining rights at Cobalt, and the facts were that some legislation of the province was clearly defective: the defects were taken advantage of by private persons, acting of course strictly within their legal rights, and the province legislated to defeat these rights, or pretended rights, at a time when the matter was before the Courts. In discussing the question of disallowance of the Acts 6 Edw. VII. c. 12 and 7 Edw. VII. c. 15, the Minister of Justice, Mr. Aylesworth, wrote as follows:—[1]

It is not intended by the *British North America Act* that the power of disallowance shall be exercised for the purpose of annulling provincial legislation even though your Excellency's Ministers consider the legislation unjust, or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the Provincial Legislature to enact it.

He amplified this language in a speech made in the House of Commons, March 1, 1909,[2] from which the following extracts are quoted as being in point:—

And in what I have to say upon the subject to-day I want, so far as possible, to discover the point of view which should

[1] *Provincial Legislation*, 1904–6, p. 8. The action of Ontario in this and the next case is denounced by Goldwin Smith in his *Reminiscences*, and there is an opinion on the cases by Dicey in 45 C. L. J. 459 seq. See *Canadian Annual Review*, 1909, pp. 378–81. In allowing the Act of 1906 Mr. Aylesworth was certain that there was no intention of interfering with existing rights, and in fact the Privy Council in 1910 held that there was no existing legal right.

[2] Canada *House of Commons Debates*, 1909, pp. 1750 seq. Cf. pp. 6920 seq.

be taken, I think, by any one occupying the position I have the honour to hold. . . . The large question of principle which was presented for consideration was simply whether or not the Provincial Legislature has the power, without control, to take one man's property and give it to another and to take away from the person injured any right of redress in the Courts. . . . I entertain in all honesty and sincerity the view that it is of vital consequence to the well-being of this Dominion that the rights of the Provinces to legislate within the scope of their authority should not be interfered with, and that every Provincial Legislature, within the limits prescribed for it by the terms of the *British North America Act*, is and ought to be supreme. I believe that this is a principle of greater importance to the welfare of this Dominion as a whole than even the sacredness of private rights or of property ownership. I am willing to go thus far in the enunciation of the views I am stating to this House, that a Provincial Legislature, having, as is given to it by the terms of the *British North America Act*, full and absolute control over property and civil rights within the Province, might, if it saw fit to do so, repeal Magna Charta itself. I know no difference between that most sacred bulwark of liberty and of property to every British subject and any piece of legislation. I take it that no one would dispute the power of a Provincial Legislature to repeal the Habeas Corpus Act, or any other charter of liberty which Englishmen possess : and in precisely the same view I take the ground that rights of property are subject only to the control of Provincial Legislatures within Canada. Having that view, it seemed to me in considering this legislation that I was not, as advising His Excellency in Council, called upon to think at all of the injustice, of the outrageous character it might be, of the legislation, but that my one inquiry ought to be whether or not there was anything in the legislation itself which went beyond the power of the Provincial Legislature to pass a law referring alone to property and civil rights within the Province. In that view I had the help of opinions which had been expressed by my immediate predecessors in office, the Hon. David Mills and the Hon. Charles Fitzpatrick—

and he quoted the passages above mentioned, and proceeded :—

I share these views. I believed, as I still believe, that it is the true spirit of our constitution. These are considerations entirely for the Provincial Legislature. It represents the

people of the Province : its members are elected by the same electors who send us to this House, and I certainly seek to put every Provincial Legislature, within the scope of its jurisdiction, as laid down in the *British North America Act*, upon an absolutely level footing with the Parliament of Canada itself so far as its legislation is concerned. I know no difference and can see no distinction to be drawn from the true reading of the language used in the *British North America Act*. Both this Parliament and the different Provincial Legislatures have limits placed by that legislation upon their jurisdiction and legislative powers, and it is of equal importance that each should keep and be kept entirely within its own limits. It would not be proper in declaring some Provincial measure to be one which ought to be disallowed, that this Parliament or its representatives, his Government, or its Minister of Justice, should transgress the limits of the jurisdiction which the *British North America Act* intended to confer upon them. My view was, and is, that any measure of this sort is one in regard to which the only appeal from the Provincial Legislature ought to be to the people who elect that Legislature, and who, if they please, may dethrone the Government of the day and deprive it of power. This was a question, it seemed to me, to have been fought out at the polls. This was not a question which it was right to relegate to the Minister of Justice or the Government of the day at Ottawa, and ask that Minister or that Government to decide, and, acting upon that view and no other, I gave the advice which I did in this matter.

It must be admitted that the case was *prima facie* one for interference,[1] and one in which the circumstances were very remarkably open to criticism. It was alleged by a certain company, the Florence Mining Company, that in December 1905 their predecessor, W. J. Green, undertook to prospect on the Cobalt Lake in Ontario, which they held was open for exploration by an Order in Council of October 30, 1905 cancelling an earlier Order in Council of August 14, 1905.

In March 1906 he made a formal application for a patent to register the claim, but this request was refused, and he was informed that the property was not open for exploration at the time. The company then decided to bring an action,

[1] See *Canadian Annual Review*, 1907, pp. 497, 498; 1908, pp. 284–6; 1909, pp. 381–3; 1910, pp. 405, 417.

but an Act of 1906 (c. 12), confirmed the Order in Council of August 14, 1905. Notwithstanding this the company brought an action on December 26, 1906, against the Cobalt Lake Mining Company, to whom the Government had in the meantime sold the property.[1]

In April 1907 an Act (c. 15) was passed by the Ontario Legislature which confirmed the sale made by the Government, and declared the property to be vested in the purchasers as and from the date of the said sales absolutely freed from all claims and demands of every nature whatsoever in respect of or arising from any discovery, location, or prospecting. Great efforts were made by the mining company to secure that the Bill should not be assented to, but their efforts were unsuccessful, and the Bill became law: whereupon the Governor-General was asked to disallow the Act, but on the advice of his ministers he declined to do so. The case was still carried to trial, but the decision of the Court was, of course, in view of the Act, against the company. A good deal of feeling was excited in financial circles in Canada, and the Court used somewhat strong language in admitting its inability to deal with the case.

The matter was discussed at length in the Dominion Parliament on March 1 and May 18, 1909, and the action of the Ontario Government was defended on grounds of the interest of the provinces at large, namely that there was thus saved to the provinces a very valuable property which otherwise would have simply conferred benefits on a few individuals.

Mr. Aylesworth, Minister of Justice, defended the conduct of the Dominion Government in not disallowing the Act.[2] He admitted that if the matter had been before 1896 the Act would have been disallowed.

In 1873, Chief Justice Draper in the *Goodhue* case[3] had

[1] See 18 O. R. 275. But it was held both in the Ontario Appeal Court in 1909 (*House of Commons Debates*, 1909, pp. 6920 seq.) and in the Privy Council in 1910 that there was really no good case.

[2] Sir J. Whitney replied in the press on March 2, energetically condemning Mr. Aylesworth.

[3] 19 Gr. 366, at p. 386.

laid down that the Governor-General was entrusted with authority, to which a corresponding duty attached, to disallow any law contrary to reason or to natural justice and equity.

Sir John Macdonald, in 1881, declared that it devolved upon the Dominion Government to see that the power of a local legislature to take away private rights was not exercised in flagrant violation of private rights and natural justice.[1]

In 1893 the acting Minister of Justice used the following language in referring to an Ontario statute :—

Assuming the statute to have the effect which the railway company attribute to it, the case would appear to be that of a statute which interferes with vested rights of property and the obligation of contract without providing for compensation, and would therefore, in the opinion of the undersigned, furnish sufficient reason for the exercise of the power of disallowance.[2]

The speech of Mr. Aylesworth received the honour of quotation at length in the reply of the Government of Ontario to the applications for the disallowance of legislation regarding electric power in the session of 1909.[3] The Legislature had intended to allow the municipalities of the province to make agreements with the Hydro-Electric Commission, a body established under an Act of 1906 (c. 15), and reconstituted under an Act of 1907 (c. 19) for the purpose of acting as agents of the municipalities in obtaining cheap water-power from Niagara. The municipalities were, however, first to be authorized to do so by a vote of the ratepayers, and it was in the intention of the Government that if this were done the council of the municipality could make the contract without ratification by the ratepayers, as was normally necessary.

[1] *Provincial Legislation*, 1867–95, p. 178.

[2] *Provincial Legislation*, 1867–95, p. 239. The Act was 55 Vict. c. 8. Similarly the Nova Scotia Mining Act, 55 Vict. c. 1, was amended to avoid disallowance ; see Lefroy, pp. 199, 200. It was objected to on the ground that it took away rights of litigants.

[3] Cf. *Canadian Annual Review*, 1908, pp. 296–311, 337, 338 ; 1909, pp. 372 seq. ; 1910, pp. 402–11. The petition for disallowance was heard at Ottawa on Oct. 7 by a sub-committee of the Privy Council, counsel appearing for the petitioner, but was refused in 1910, and the Courts declined to interfere with the law.

The Act of 1908 (c. 22) was stated in the Legislature to effect this purpose, and its intention seems to have been clear, but its wording was not, and one mayor declined to sign the contract passed by the Council of Galt. An action was brought to compel him to sign, but it was then held that the Act did not suffice to render it unnecessary for the ratification of the ratepayers to be extended to such a contract, and actions were brought against the cities of Toronto and London to restrain the Municipal Councils from entering into an agreement with the Commission. The fact was, of course, that the existing companies were not at all anxious to see this rival interfering in the electric supply business. The municipalities petitioned the Legislature, and in the result an Act (9 Edw. VII. c. 19) was passed to validate the contracts made, though not confirmed by submission to the ratepayers. Requests were made for disallowance, but the Government of Ontario drew up a learned memorial which it sent to the Governor-General in December 1909. After reciting the facts and dealing with supposed objections to the constitutionality of the legislation, the memorial ends :—[1]

Finally the people of Ontario take their position on the positive and unshaken foundation formed by the *British North America Act* and the decisions which have been indicated, and in agreement with the principle laid down by the present Minister of Justice in the report and speech herein above quoted, and respectfully submit that for upwards of two hundred years the Lords and Commons of Great Britain have legislated without fear of the royal veto, although its existence has been undoubted, and therefore, in full accord with the spirit and genius of British Institu-

[1] There have been of recent years constant complaints of Dominion interference—the provincial authority is asserting itself and increasing; the Inter-provincial Conference of 1887 demanded the abolition of the Dominion veto power; cf. Sir W. Laurier in New South Wales *Parliamentary Debates*, 1910, Sess. 2, p. 714, and the total refusal of the Dominion Government in the negotiations in 1910 and 1911 with the United States to attempt any interference with Ontario and Quebec legislation forbidding the export of pulp wood. Cf. also *Provincial Legislation*, 1899–1900, pp. 17 seq.; *House of Commons Debates*, 1910–11, p. 3390; the Quebec view, *Canadian Annual Review*, 1905, p. 314.

tions, the people of the Province entitled to all rights of British subjects elsewhere, and as free, as has been practically pointed out by the Minister of Justice, to legislate within their jurisdiction as the Lords and Commons of Great Britain are free to legislate, cannot submit to any check upon the right of the Legislature to legislate with reference to subjects within its well-defined jurisdiction, although a technical right to disallow may exist. Any other view would mean that there are different grades of British subjects in the Empire; that the people of the several provinces of the Dominion have not and are not entitled to the full and free enjoyment of those civil rights and liberties which are enjoyed by British subjects in the Mother Country, a condition of things which would be intolerable. Without, therefore, in any way suggesting the possibility of such interference, an appreciation of the very grave and serious consequences which must inevitably follow such an act fully justifies, in the opinion of the undersigned, a respectful recital of the rights of the Province in this behalf, and a clear intimation of its attitude in respect thereto.

§ 6. The Judicature

The *British North America Act* does not create, as does the Commonwealth Constitution, a Court for the whole of Canada; that it left to be done by local legislation, though s. 101 of the Act allows the Parliament of the Dominion to provide for the constitution of a general Court of Appeal for Canada, and the creation of other Courts required for the administration of justice in the Dominion. The provinces have sole power to provide for the constitution and organization and maintenance of Courts for provincial purposes, including Courts of both civil and criminal jurisdiction, and civil procedure is reserved to these legislatures, subject of course to the power of the Dominion Parliament to cast upon these tribunals special rules in matters such as bankruptcy and insolvency, which fall within the special purview of the Dominion Parliament. The Act also provides that the judges of the Superior District and County Courts in the provinces are to be paid by the Dominion, and vests their appointment in the Governor-General. It is also provided that pending, what has never happened, legislation by the

Dominion Parliament under s. 94 of the Act for the unification of the laws of Nova Scotia, New Brunswick, and Ontario, the judges must be appointed from the bar of these provinces respectively, and this rule has been applied to Prince Edward Island. In the case of Quebec it is expressly laid down in the Act itself. The Courts of Probate in New Brunswick and Nova Scotia, by a curious exception, remain outside the whole sphere of the arrangement, and are left to the sole provincial jurisdiction. As has been noted above, there have been a good many attempts of the provinces to override the law; e. g. Nova Scotia Act, 59 Vict. c. 17.

The Supreme Court of Canada was constituted in 1875 as a general Court of Appeal, and it was proposed to withdraw all possibility of appealing to the Privy Council: that was, it was pointed out, certain to render the Act unlikely to be assented to, and the clause in question was withdrawn, and now appeals lie by special leave to the Privy Council from it in every case and also direct to the Privy Council from the Supreme Courts of the several provinces. Its appellate jurisdiction is curiously varied in respect of the different provinces: the details are given in the *Supreme Court Act*, chapter 139 of the *Revised Statutes*, 1906. It has also a curious original jurisdiction: the Governor-General in Council can refer to it any important question affecting the interpretation of the *British North America Acts*, 1867–86, the constitutionality of any Dominion or Provincial Act, the appellate jurisdiction in educational matters whether given by the *British North America Act* or by subsequent Acts of the provincial constitution, the powers of the Parliament of Canada and the Legislatures of the provinces or their Governments in regard to any particular matter, and any other matter, whether or not *eiusdem generis* with the preceding matters, which the Governor-General in Council deems fit to submit. The submission is only to apply to important questions of law or fact, but the submission *ipso facto* makes the matter important, and bars any right to deny that it is important. The judgement or answers in such a question, though merely advisory, are to be treated as a final judgement for the purpose

of reference to the Privy Council. Moreover, every judge has the power concurrent with the Courts in the provinces to issue a writ of *habeas* in any criminal matter, subject in case of refusal to appeal to the full Court. In such cases the judge has the full powers of a Court of justices of the peace. It is also provided that if the Provincial Legislatures agree the Supreme and Exchequer Courts can exercise jurisdiction in cases between the Dominion and a province or two provinces and a judge of a Provincial Court must, if the parties so ask, and may, if he think fit, refer any point which is raised as to the validity of a Provincial Act or a Dominion Act to the Court, which will deal with the point: no appeal lies then on that point to the Court, or on any other point, unless the value of the matter at issue exceeds five hundred dollars.[1]

The only other ordinary Federal Court which has been instituted by the Dominion is the Court of Exchequer, which is also the Court of Admiralty,[2] and has jurisdiction among other matters in petitions of right. For the rest of the federal jurisdiction, recourse is had to the ordinary Courts maintained by the provinces, though the criminal procedure is all determined by Canadian statutes, and the Parliament can also regulate such matters as bankruptcy and insolvency. Election petitions are assigned to the Provincial Courts, which also have jurisdiction in provincial controverted elections.

An interesting case has recently been decided as to the general power of the Dominion Supreme Court to hear appeals from the provinces. It was alleged by one party in the case of the *Crown Grain Company Limited* v. *Day*[3] that it was

[1] Such Acts have been passed by Ontario (*Rev. Stat.*, 1897, c. 49), Nova Scotia (*Rev. Stat.*, 1900, c. 154), Manitoba (*Rev. Stat.*, 1902, c. 33, s. 7), British Columbia (*Rev. Stat.*, 1897, c. 53), and New Brunswick (*Rev. Stat.*, 1903, c. 110).

[2] A separate division exists at Toronto, formerly the Maritime Court of Ontario, created in 1877. See *McCuaig and Smith* v. *Keith*, 1 Cart. 557.

[3] [1908] A. C. 504, affirming the Supreme Court decision in 39 S. C. R. 298; cf. *City of Halifax* v. *McLaughlin Carriage Co.*, 39 S. C. R. 174; *Clarkson* v. *Ryan*, 17 S. C. R. 241. That the Court is a Court of general appeal—not merely from federal questions—is obvious; see *L'Association St. Jean Baptiste* v. *Brault*, 31 S. C. R. 172.

competent for the Legislature of Manitoba to set up a special jurisdiction, from the exercise of which there would lie no appeal to the Supreme Court. The attempt failed entirely, the Privy Council being clear that it was not possible for the Provincial Legislature to do anything which would have the effect of preventing appeals lying in all cases from the Provincial Court if the Dominion Parliament itself did not expressly limit the right of appeal: they pointed out that it was clear that if the claim put forward by the Manitoban Legislature were correct, it would be possible for the provinces, by legislation with regard to every subject within their provincial jurisdiction, to oust the Dominion Supreme Court entirely from its position as a Court of Appeal in provincial cases, an intention which was clearly counter to the intention of the *British North America Act*.[1]

The provinces have all Supreme Courts, which act also as Courts of Appeal when there are no separate Courts of Appeal, and in all cases a variety of minor Courts, sometimes, as in Quebec and Ontario, forming an imposing hierarchy. It is important to note that only certain of these Courts have any jurisdiction in divorce, and that only as an historical accident. The sole power of legislating as to divorce lies in the hands of the Dominion, while all matters relating to the solemnization of marriage rest still with the provinces. Therefore a divorce jurisdiction exists only in such cases as it was existing before the province in question entered the union: none of the subsequently created provinces could legislate to create a jurisdiction. As a result, the Provincial Courts of the Maritime Provinces have jurisdiction in divorce, those of Ontario, Quebec, Manitoba, Saskatchewan, and Alberta have not, and the case of British Columbia was thrown in doubt by a decision of Clements J. in the *Watts* case, in which he held, differing from a ruling by the full Supreme

[1] In Ontario in 1909 it was proposed to limit appeals to the Supreme Court as to the Privy Council by Provincial Act, but this was not done, as it was realized that it was *ultra vires*; see *Canadian Annual Review*, 1909, p. 368. Cf. *Canadian Law Times*, ii. 416; xi. 147; Lefroy, op. cit, p. 321.

Court of the province, that the Court had no divorce jurisdiction. The ground for his decision was that the only means by which it could ever have been introduced was by the proclamation of Governor Douglas in 1859 and the Act of the Provincial Legislature, while the country was still a Colony, in 1867 adopting English law so far as applicable to the conditions of the place. The judge held that the mere adoption of English law was too vague to allow of the introduction of so special a matter as divorce legislation, and he pointed out that the Imperial Act of 1857, which created a divorce jurisdiction, entrusted it not to the ordinary Court but to a special Court. The Privy Council[1] would not accept this reasoning, but reversed the decision of the Court and declared that, in view both of the law and of the fact that there had been a continuous exercise of such jurisdiction, the judge was clearly wrong. As a matter of fact, the case had already been disregarded by Martin J., who in a subsequent case, *Sheppard* v. *Sheppard*,[2] decided after an elaborate historical argument that the jurisdiction could not possibly be denied to be fully valid. The Dominion has never legislated, and divorce is still only possible in the other provinces by an Act of Parliament of the Dominion. The practice for the Senate to act in such cases as practically a Court, and the absence of a law of divorce, are merely inconvenient and irritating. But of course, in view of the changes in that law made in Australasia, it is certain that any Canadian law would propose to go much further than merely to establish a Court to adopt the law in England, as is now the only possible proceeding in Canada in the provinces which have courts with jurisdiction, while the Parliament follows the same principles; and as the opposition of Quebec would be very strong against any change, there is no immediate likelihood of the removal of this blot on the juristic system of the Dominion. From all the Courts appeals lie direct to the

[1] *Watts* v. *Attorney-General for British Columbia*, [1908] A. C. 573. For a discussion, see *Senate Debates*, 1910–1, pp. 293 seq., where full statistics of all divorces are given, and the practice of parliamentary divorce severely handled.

[2] Cf. 13 B. C. 281.

Privy Council both by special leave and as of right. Fresh Orders in Council were issued in 1910–1 in respect of Nova Scotia, New Brunswick, Manitoba (where a new Court of Appeal has been established), British Columbia (also from the Court of Appeal), Prince Edward Island (hitherto without any appeal as of right), Alberta, and Saskatchewan. In Quebec and Ontario appeals as of right are regulated by local Act.

It should be noted that the Canadian Court has been reluctant to exercise the very wide functions entrusted to it since 1890 with regard to examining the constitutionality of legislation. The matter was discussed at some length in the case of the references as to prohibiting Sunday labour.[1] It was then urged that, under the jurisdiction then conferred upon it, the Court should only deal with matters which had formed the subject of actual legislation, and not with matters which had not yet formed the subject of legislation, and the wording of the Act was relied upon, the other matters referred to it being held by the majority of the Court, Idington J. dissenting, to refer to other matters of the same class as those enumerated specifically, which appeared to contemplate the examination of existing legislation, and not speculative questions. It was pointed out in that case that the matters in which they had been consulted, such as the question of prohibitory liquor legislation,[2] the validity of the bigamy sections of the Criminal Code,[3] the rights of the Dominion and the provinces in the fisheries,[4] the representation of the provinces in the Dominion House of Commons,[5] and so forth,

[1] 35 S. C. R. 581. It may be added that in the provinces also the Supreme Courts have imposed upon them by law the duty of giving opinions on the constitutionality of Acts, for the guidance of the Provincial Governments. In such cases, even by Provincial Act, no appeal lies to the Supreme Court; see *Union Colliery Co.* v. *Attorney-General of British Columbia*, 27 S. C. R. 637.

[2] 24 S. C. R. 170; carried to P. C., [1896] A. C. 348.

[3] 27 S. C. R. 461; above, p. 376.

[4] 26 S. C. R. 444; [1898] A. C. 700; at p. 717, the Privy Council declined to pass orders on abstract questions affecting private rights; and cf. *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*, [1903] A. C. 524, at p. 529, for the same doctrine.

[5] 33 S. C. R. 475 and 594; carried to P. C., [1905] A. C. 37.

all concerned actual legislation, but they consented on that occasion to give replies to the questions submitted. The Government, however, took the precaution of amending the Act by 6 Edw. VII. c. 50, so as to require an opinion on any question whether legislation had taken place or not, and the Court in a recent case [1] decided to give an opinion upon that basis, although they intimated some doubt as to whether they were bound to do so, and whether the statute was within the constitutional powers of the Dominion Parliament; indeed Girouard J. only concurred because the discussion bound nobody, not even themselves! Idington, Davies, Duff, and Anglin all expressed dissatisfaction with the position, but deferred to the statute. The question has again been raised in a concrete form by the appeal to the Privy Council of the provinces from the decision of the Supreme Court that it is part of its duty to, and that it will consider the general reference made to it by the Dominion Government as to the powers of companies incorporated by provinces and of companies incorporated by the Dominion or other authority.

It may be added that during the passing through the House of Representatives of the similar Commonwealth Act, No. 34 of 1910, some doubt was expressed as to the power of the Commonwealth so to legislate, but Sir John Quick did not press the matter, on the ground that the legislation was useful and desirable.

There has been, of course, a very large number of cases [2]

[1] *In re Criminal Code*, (1910) 43 S. C. R. 434. Cf. Lefroy, p. 126, n. 1; 586, n. 1; *House of Commons Debates*, 1890, pp. 4083 seq.; 1893, pp. 1790 seq.

[2] These cases consider merely interpretation of the statutes of Canada on the point, and are of no general importance; see for example, *Toronto Railway Co.* v. *Balfour*, 32 S. C. R. 239; *Finnie* v. *City of Montreal*, ibid., 335; *Town of Aurora* v. *Village of Markham*, ibid., 457; *Rice* v. *The King*, ibid., 480; *Hartley* v. *Matson*, ibid., 575; *Union Colliery Co.* v. *Attorney-General of British Columbia*, 27 S. C. R. 637 (no appeal lies from a decision on a constitutional question submitted to the Court of British Columbia under 54 Vict. c. 5, though it is deemed to be a judgement—for it is not really one); *Lake Erie and Detroit River Railway Co.* v. *Marsh*, 35 S. C. R. 197; *Gilbert* v. *The King*, 38 S. C. R. 284; *James Bay Railway Co.* v. *Armstrong*, ibid., 511; *Hamel* v. *Hamel*, 26 S. C. R. 7; *Turcotte* v. *Dansereau*, 24 S. C. R. 578.

on the appeal from the provinces to the Dominion, and Ontario has been anxious (for example in 1909) to reduce the cases in which appeal is allowed. As a Court of Appeal the Supreme Court is bound to take legal notice of the law of each Province of Canada,[1] but it is certainly striking that it should insist on refusing to hear appeals from the reference of constitutional questions by the Provincial Government to the Courts,[2] though this is provided for by the Provincial Acts, and these Acts provide that appeals shall lie, and treat them as final judgements in every way. Clearly a decision on appeal would bind the Courts below, but no doubt it is felt that the reference in such cases should be rather to the Privy Council as the final Court of Appeal.

§ 7. Financial Relations

Part viii of the *British North America Act* deals with the finances of the Federal and Provincial Governments. The revenues of the old provinces are made into a consolidated fund, except such portion as is reserved to the provinces or raised by them under the powers given by s. 92 of the Act, and that fund is permanently charged with the cost of collection, then with the interest of the provincial debts, and next with the salary of the Governor-General, fixed at £10,000 subject to alteration by the Parliament. After that rank appropriations made by the Parliament of Canada. All stocks, cash, bankers' balances, and securities for money are transferred to Canada, and are to be taken in reduction of the public debt of each province, while the public works scheduled in the third schedule to the Act were transferred to Canada. Then[3] by s. 109 it is provided that all lands, mines, minerals, and royalties belonging to the several provinces, and all sums then due or payable for such lands,

[1] *Logan* v. *Lee*, 39 S. C. R. 311; *Cooper* v. *Cooper*, 13 App. Cas. 88.

[2] See Ontario Act, 1909, c. 52; Alberta Act, 1908, c. 9; Saskatchewan *Rev. Stat.*, 1909, c. 57; and the *Rev. Stat.* of the Provinces of Quebec, Nova Scotia, New Brunswick, Manitoba, and British Columbia.

[3] Cf. *Booth* v. *McIntyre*, (1880) 31 U. C. C. P., at pp. 193, 194; Lefroy, op. cit., p. 614, as to what is a trust.

mines, minerals, and royalties, shall belong to the several provinces in which they are situated or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same. This section has been held by the Privy Council[1] not to make the rights of the Indians to annuities in any way a charge on the lands of the provinces. Moreover, by s. 117 the provinces retain all their public property not otherwise expressly disposed of. They also retain the assets connected with such portions of the public debt as are retained by the provinces. Canada assumed the debt of the United Provinces up to $62,500,000 free, of Nova Scotia up to $8,000,000, of New Brunswick up to $7,000,000, the rest being assumed subject only to a payment by the province of five per cent. per annum. On the other hand, if the public debts of the last two provinces did not exceed the amounts mentioned, Canada was to pay five per cent. on the difference between the total authorized and the actual debt. The debts were to be lessened by the value of the cash, &c., transferred to the Federal Government. In addition, the provinces were to receive each annually eighty, seventy, sixty, and fifty thousand dollars for Ontario, Quebec, Nova Scotia, and New Brunswick respectively, plus eighty cents per head of the population as ascertained at the census of 1861, and in the case of the small provinces, at each successive decennial census until the population reached four hundred thousand, at which it was to remain fixed. The grants were to preclude any future demand on the Federal Government, and were to be paid half-yearly in advance, after deduction of any interest owing to Canada on debt account. Moreover, a special grant was made by s. 119 to New Brunswick. Fresh arrangements were made with each of the subsequently acquired provinces, but of these all save Prince Edward Island—which had none—did not receive full control of their public lands, though British Columbia retained the bulk of her land, and

[1] *St. Catherine's Milling and Lumber Co.* v. *Reg.*, 14 App. Cas. 46; 13 S. C. R. 577; 13 O. A. R. 148; 10 O. R. 196; Biggar, *Sir Oliver Mowat*, ii. 459–63.

only surrendered the railway lands, including, according to a recent decision of the Privy Council, water rights over such lands, but not the precious metals therein. The provinces which did not receive the land revenue were compensated by additional grants, and Prince Edward Island, which had no lands, received a subsidy for the buying out of the proprietors.[1] Finally, after long agitation,[2] the Canadian Government decided in 1907 to make a new arrangement, and to increase the grants to the provinces, and this was done, as was necessary, by an Imperial Act of 1907 (c. 11), which fixed the grant as follows: (*a*) a fixed grant according to population: where that is under 150,000 a grant of $100,000, where not exceeding 200,000, $150,000; where not exceeding 400,000, $180,000; where not exceeding 800,000, $190,000; where not exceeding 1,500,000, $220,000; where over 1,500,000, $240,000. (*b*) A grant at the rate of eighty cents per head of the population of the province up to 2,500,000, and at the rate of sixty cents per head of so much of the population as exceeds that number. An additional grant of $100,000 was made to British Columbia for ten years in view of its exceptional needs for development, while each of the provinces of Saskatchewan and Alberta received a grant of $93,750 a year for five years in lieu of land revenue, in order to provide public buildings.

The change was interesting because of certain of the proceedings which led up to it. When an agreement had been arrived at in Canada in 1906, the Province of British Columbia sent over its Premier, Mr. McBride, to endeavour to induce

[1] On the long question of provincial rights of land, subsidies, &c., see Canada *Sess. Pap.*, 1885, No. 34; *Rev. Stat.*, 1906, cc. 28 and 99; for British Columbia, see Willison, *Sir Wilfrid Laurier*, i. 369–408; for Manitoba, *Canada Gazette*, xliv. 3210–2; Manitoba *Sess. Pap.*, 1910, pp. 107 seq.

[2] *Canadian Annual Review*, 1905, pp. 314–21, 333, 387; 1907, pp. 605 seq. The Conservative policy demands the lands for Manitoba, Saskatchewan, and Alberta. In 1885 Manitoba received the swamp lands. The financial terms with each of the new provinces are set out in the Constitution Acts of 1870 (33 Vict. c. 3, s. 30) and 1905 (4 & 5 Edw. VII. cc. 3 and 42, ss. 18–20). On the limits of the powers to tax the lands of the two new provinces, cf. *R.* v. *Canadian Pacific Railway Co.*, [1911] A. C. 328.

the Imperial Government to insist on a doubling of the sums provided for the provinces. On the other hand, the Dominion Government wanted to assert the finality of the measure by inserting provisions that the settlement should be final, but this was not done by the Imperial Government, on the ground that such a provision in an Imperial Act had no validity, as what one parliament could do the next could obviously undo. Moreover, a letter was sent to the Premier in which the Imperial Government recognized that the federation of Canada was a compact, and that therefore alteration of it by an Imperial Act was only justifiable if all parties were in effect agreed: but this was so in this case, and British Columbia would not wish to delay the payment to the other provinces of their increased grants under the new scheme. But British Columbia still hopes to obtain better terms.[1]

The *British North America Act*[2] provided that there should be free admission of articles, the growth or produce or manufacture of any of the provinces, into the other provinces, although otherwise the duties levied by each province were to remain unchanged until they were altered by the Canadian Parliament. Goods which had paid duty in one province could, however, be imported into another on payment of the difference (if any) between the two duties. The Province of New Brunswick was, however, allowed[3] to maintain and reduce its lumber dues, but not to increase them. No lands or property belonging to Canada or a province could be taxed by either the provinces or the federation. All the remaining revenues of the provinces and all revenues raised under the powers granted by s. 92 of the Act were to form a consolidated revenue fund liable to appropriation by the Provincial Legislature.

§ 8. Treaty and other Matters

The Act contains also in part ix certain miscellaneous provisions rendered necessary by the transfer. The officers

[1] *Canadian Annual Review*, 1908, p. 524; British Columbia *Sess. Pap.*, 1907, D. 1; 1908, C. 1.

[2] ss. 121–3.

[3] s. 124. The Treaty of Washington rendered it necessary to buy out these rights, and the Dominion did so; see 36 Vict. c. 41.

of Canada whose functions were not provincial were to continue in office and exercise their functions as before, and the Governor-General in Council could appoint new officers. All laws in force were to remain in force until altered by the authorities created by the Act, but no powers of alteration which were not before existing were given by s. 129, a fact which told against the claim made by the Minister of Justice of Canada in regard to copyright, that the Parliament had power to repeal any Imperial Act extending to Canada before 1867. Then several sections provide for the constitution of officers in Quebec and Ontario in place of the officers of the United Provinces; the Lieutenant-Governors were authorized to change the Great Seals by Order in Council for these provinces; arrangements were made for an arbitration as to the property of the Union to be transferred to either province,[1] and the records were to be distributed by the Governor-General in Council, and provision was made for the accepting in evidence of certified copies of such records, presumably to avoid trouble in producing an original in the province in which it was not to be kept. Provision was also made for the issue of proclamations before union to commence after union, and for proclamations after the union to be made in virtue of antecedent authority of the united province.

There are also more important clauses: s. 132 confers on the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries. The effect of this

[1] See Canada *Sess. Pap.*, 1871, No. 21. The Quebec arbitrator refused to act because of disagreements, but the award of the other two arbitrators was proceeded with and pronounced valid; see *In the Matter of an Arbitration and Award between the Province of Ontario and the Province of Quebec*, 4 Cart. 712. For further developments of this question and of the subsequent arbitration of 1891 (54 & 55 Vict. c. 6; Ontario, 54 Vict. c. 2; Quebec, 54 Vict. c. 4), see *Attorney-General for Ontario* v. *Attorney-General for Quebec*, [1903] A. C. 39; *Province of Quebec* v. *Province of Ontario*, [1910] A. C. 627; *Province of Ontario and Dominion of Canada* v. *Province of Quebec*, 25 S. C. R. 434.

provision has been noted below. As regards language, it was provided that either the English or the French language might be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; both languages have to be used in the journals and the respective records of these Houses, and either might be used by any person or in any pleading or process in or issuing from any Court of Canada established under the Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec were to be printed and published in both languages: it is a remarkable fact that there has as yet been no final ruling in either the Dominion or the province, save as regards the Quebec civil code and the *Revised Statutes* of 1909, which language is to prevail: seemingly the rule is rather to see which reading in case of divergency is the more suitable to the sense of the statute, or in the case of a consolidation more nearly repeats the original enactment which it may be presumed the Act was intended to consolidate. Fortunately serious discrepancies are not probable.

S. 145 of the Act laid upon the Government and the Parliament of Canada an obligation to proceed within six months to start the intercolonial railway between the St. Lawrence and Halifax. It had been felt that this step was essential if the British dominions in North America were ever to be consolidated, and the Maritime Provinces made the construction of this line a *sine qua non* of their consent to federation.[1] Similarly, the terms of the agreement for the addition of British Columbia to the Dominion in 1871 required that there should be built a line of railway from the east to the west. There was great delay in the building of the line, and as a result the Provincial Government deputed two members of the Cabinet to go home to lay representations before the Secretary of State. Lord Carnarvon offered in a dispatch of June 18, 1874, to arbitrate; both the Dominion and the province accepted his proposal, and he made suggestions in a dispatch of August 16 for the settle-

[1] See Sandford Fleming, *The Intercolonial Railway* (1876).

ment of the whole matter. Finally, after further discussion, the matter was decided for the time by a dispatch of November 17 declaring the award of the Secretary of State. Unhappily there was delay in carrying out the award, and on February 2, 1876, the Legislative Assembly petitioned the Queen to insist on the Federal Government observing the award. In 1876 the Governor-General made a visit to the province, and in a brilliant series of speeches brought home to the province the difficulties and troubles which had beset the great undertaking : Lord Dufferin allayed for the time the trouble, but it broke out again in 1878, and was only diminished by the change of government in the Dominion and the satisfactory assurances given by the administration of Sir John Macdonald.[1]

§ 9. The Entry of New Provinces

The last section of the Act provides for the entry of new provinces in the shape of Newfoundland, Prince Edward Island, and British Columbia, on addresses from both Houses of the Parliament and of the Legislatures of the provinces, and also for the admission of Rupert's Land and the North-Western Territory on the conditions expressed in these addresses and approved by the Queen : the mode of admission was by Order in Council, and the Order was to have the force of an Imperial Act. It was provided that if Newfoundland entered she could have four additional senators, but the four accorded to Prince Edward Island were to be taken as vacancies occurred from the other two maritime provinces, reducing the number to ten apiece. It is curious that this part of the Act was the least satisfactory of all. In the case of the admission of Rupert's Land no conditions were inserted in the address, and so the position was of doubtful validity,

[1] Canada *Sess. Pap.*, 1875, No. 19 ; 1876, No. 41 ; 1885, No. 34 ; Willison, *Sir Wilfrid Laurier*, i. 369–408. The province desired a reference to the Privy Council of the whole question, but this was declined by the Dominion when the Secretary of State was ready to arrange it. The interpretation of the terms of union has in several cases come before the Courts ; see *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 App. Cas. 295 ; *Burrard Power Co.* v. *The King*, 43 S. C. R. 27 ; [1911] A. C. 87.

while as the rest of the territory of the Hudson's Bay Company was not to be made into a province, there was only the most doubtful power for the Dominion to legislate: the Crown might indeed, in the ideas of that day, by the prerogative annex territories to a Colony, and the Dominion was no doubt a Colony, but the Dominion had been defined by an Imperial Act, and the legislative powers of the Dominion were definitely powers to be shared with a Provincial Legislature, so that there were any number of doubts possible as to the validity of the position if the Parliament were not given fresh powers. This was done by an Imperial Act of 1871,[1] which ratified the Acts [2] of Canada for the government of the territories and of Manitoba, and gave to the constitution of the province, and of any further provinces which it empowered the Dominion Parliament to form out of surrendered lands, permanence by forbidding alteration by the Dominion Parliament, except with the consent of the Legislature of the province, by way of increasing or diminishing or altering the territory and making consequential changes of law. The Act also empowers the Parliament to legislate for the peace, order, and good government of any territory included in the boundaries of the federation. Finally, it authorized the providing of representation in the Parliament of such new provinces as might be created. An Act of 1886 [3] allowed the representation in the Parliament of the territories before they were made provinces. Senators were added also under the terms of the agreement with British Columbia, though that was not specially contemplated in the *British North America Act*.

§ 10. The Territories

The power to legislate for the territories is derived from the Act of 1871, and its pervading character was declared by the Privy Council in the case of *Riel* v. *Reg.*[4] The power has been exercised in many different forms, and the remaining

[1] 34 & 35 Vict. c. 28; *Provincial Legislation*, 1867–95, pp. 8–11.
[2] 32 & 33 Vict. c. 3; 33 Vict. c. 3. See Canada *Sess. Pap.* 1871, No. 20.
[3] 49 & 50 Vict. c. 35, confirming the Canadian Act, 49 Vict. c. 24.
[4] 10 App. Cas. 675.

British territories in North America were all added to the Dominion in 1880, this step being rendered desirable by the doubts as to the boundaries of the Hudson's Bay territories : it may be noted that Canada has of late years been active in visiting the northern islands, and that it claims all the islands to the north of the Dominion : it was indeed discussed for a time whether the claim of the North Pole for the United States by Commander Peary was not an inroad on British territory ; fortunately any serious trouble is hardly likely to arise, for the dependence of the northern islands on Canada is clear and undoubted.[1]

In the first years after the federation the Government of the territories was simple : there was a Lieutenant-Governor with a nominated Council appointed by the Governor-General in Council, and the first step to an advance was the substitution in 1875 of election for nomination in the selection of part of the Legislative Council. In 1886 representation in Parliament was conceded. In 1888 (c. 19) there was created a Legislative Assembly of twenty-two members in place of the old Legislative Council. The three judges were to act as expert members, to debate but not to vote. Then there was an advisory finance council holding office at pleasure. In 1891 (c. 22) additional powers were conceded to the legislature. In 1897 (c. 28) a responsible executive was set up, and in 1898 (c. 5) and 1900 (c. 44) there followed important legislation resulting in a quasi-provincial constitution of a Lieutenant-Governor with an Executive Council, which was appointed from the Assembly, an elective Assembly of thirty-one members selected on manhood suffrage, and power to legislate on a wide range of domestic questions, though not with full provincial authority.[2] In 1905 the new provinces

[1] Hudson's Bay is part of Canadian territory under the *Revised Statutes*, 1906, c. 45. This rests on history : the grant of Charles II to the company was clearly of the water as territorial, there is a long history of treatment as territorial, and cf. the treaty with the United States of 1819. For Hecate Straits, cf. *Canadian Annual Review*, 1909, p. 626.

[2] Cf. as to powers of North-West Territories legislation, *O'Brien* v. *Allen*, (1900) 30 S. C. R. 340 ; *North Cypress* v. *Canadian Pacific Railway Co.*,

of Saskatchewan and Alberta were created[1] and endowed with practically full provincial rights, though not with the control of the Crown lands, which are vested in Canada and which Canada administers under a vigorous immigration system. Moreover, in their Acts provision is made to secure the Catholics their denominational schools, a course which caused much annoyance among a section of the Opposition in the Dominion Parliament.

There are still left portions of the old North-Western Territories, and the Yukon, which has a status intermediate between that of a province and the North-West. The powers of the administration of these two places are as follows :—

In the case of the North-Western Territories the Commissioner is assisted by the Council, not exceeding four in number, appointed by the Governor-General in Council.

The powers of the Commissioner in Council to make Ordinances, under the Dominion Act,[2] are such of those of the former legislature as on August 31, 1905, as are designated by the Governor-General in Council.

And in particular, but not so as to restrict the generality of that provision, the Commissioner in Council has power, subject to the provisions of the Act, and of any other Act of the Parliament of Canada applying to the territories, to make ordinances for the government of the territories in relation to such of the classes of subjects next hereinafter mentioned as are from time to time designated by the Governor in Council, that is to say :—

35 S. C. R. 588 ; *Dinner et al.* v. *Humberstone*, 26 S. C. R. 252 ; *Conger* v. *Kennedy*, 26 S. C. R. 397. See Canada *House of Commons Debates*, 1897, p. 4115.

[1] An admirable account of the discussions is given in the *Canadian Annual Review*, 1905, pp. 44 seq. Mr. Sifton resigned over the school question (pp. 27 seq.), and the interference of the Roman Catholic church was a source of great indignation (pp. 93–7).

[2] *Rev. Stat.*, 1906, c. 62. For the North-West in its early days, see Canada *Sess. Pap.*, 1877, No. 121 ; *Canadian Annual Review*, 1905, pp. 48 seq. For the claim of Canada to all the Arctic islands, which is clearly valid, see *Canadian Annual Review*, 1909, pp. 204, 205 ; Bernier, *Voyage of the Arctic*, 1908–9, pp. 194 seq., 320 seq.

(*a*) Direct taxation within the Territories in order to raise a revenue for territorial or municipal or local purposes.

(*b*) The establishment and tenure of territorial offices and the appointment and payment of territorial officers out of territorial revenues.

(*c*) The establishment, maintenance, and management of prisons in and for the Territories, the expense thereof being payable out of territorial revenues.

(*d*) Municipal institutions in the Territories, including the incorporation and powers, not inconsistent with any Act of Parliament, of irrigation districts, that is to say, associations of the landowners, and persons interested in the lands, in any district or tract of land for the purpose of constructing and operating irrigation works for the benefit of such lands.

(*e*) The closing up or varying the direction of any road allowance, or of any trail which has been transferred to the Territories, and the opening and establishing of any new highway instead of any road or trail so closed, and the disposition of the land in any such road or trail.

(*f*) Shop, saloon, tavern, auctioneer, and other licences, in order to raise a revenue for territorial or municipal purposes.

(*g*) The incorporation of companies with territorial objects, excepting railway companies (not including tramway and street railway companies), and steamboat, canal, telegraph, and irrigation companies.

(*h*) The solemnization of marriage in the Territories.

(*i*) Property and civil rights in the Territories.

(*j*) The administration of justice in the Territories, including the constitution, organization, and maintenance of territorial courts of civil jurisdiction, and procedure in such courts, but not including the appointment of any judicial officers or the constitution, organization, and maintenance of courts of criminal jurisdiction, or procedure in criminal matters.

(*k*) The mode of calling juries, other than grand juries, in criminal as well as civil cases, and when and by whom and the manner in which they may be summoned or taken, and all matters relating to the same.

(*l*) The defining of the powers, duties, and obligations of sheriffs and clerks of the courts, and their respective deputies.

(*m*) The conferring on territorial courts of jurisdiction in matters of alimony.

(*n*) The imposition of punishment by fine, penalty, or imprisonment, for enforcing any territorial ordinances.

(*o*) The expenditure of territorial funds and such portion

of any moneys appropriated by Parliament for the Territories as the Commissioner in Council is authorized to expend.

(*p*) Generally, all matters of a merely local or private nature in the Territories.[1]

The Commissioner in Council can also if authorized pass Ordinances as to education, subject to the same restrictions as in the case of the Yukon, and any Ordinance whatever may be disallowed by the Governor-General in Council within two years.

The laws of Canada, unless otherwise specified, apply to the North-Western Territories, but power is given to the Governor-General in Council in the case of legislation as to liquor and to arms and ammunition and judicial matters.

Further, the Governor-General in Council may apply to the Territories Acts which would not otherwise be in force. It may be added that the Canadian Parliament could confer powers larger than those of the provinces on the Legislatures of the Yukon and the Territories, if it thought fit, but naturally that step is out of the question.

The Yukon is a part of the old North-Western Territories given a separate constitution and with a separate history as a specifically mining territory. In the Yukon Territory there was from 1898 (61 Vict. c. 6, as amended by 62 & 63 Vict. c. 11) until 1909 a Council of the Yukon Territory consisting of not more than eleven members, five of whom were elective and the remainder appointed by the Governor-General of Canada under his Privy Seal. An Act of 1908 (c. 76) altered the position, and in 1909 the first purely elective council of ten members was chosen. The Council lasts for three years subject to being dissolved by the Commissioner. Annual sessions are required.[2]

The Executive Government is conducted by a Commissioner who is subject to the directions of the Governor-General in Council, and responsible government does not yet exist. But the Commissioner is expected to adapt his policy to the desires of the Legislature, especially since it is now purely elective.

[1] So far the Commissioner's powers have not been exercised.

[2] See *Canadian Annual Review*, 1907, pp. 614–16; 1909, pp. 594, 595.

The Commissioner in Council may now legislate on the following subjects :[1]

(*a*) The establishment and tenure of territorial offices and the appointment and payment of territorial officers out of territorial revenues.

(*b*) The establishment, maintenance, and management of prisons in and for the Territory, the expense thereof being payable out of territorial revenues.

(*c*) Municipal institutions in the Territory.

(*d*) Shop, saloon, tavern, auctioneer, and other licences, in order to raise a revenue for territorial or municipal purposes.

(*e*) The incorporation of companies with territorial objects, excepting railway companies (not including tramway and street railway companies), and steamboat, canal, telegraph, and irrigation companies.

(*f*) The solemnization of marriage in the Territory.

(*g*) Property and civil rights in the Territory.

(*h*) The administration of justice in the Territory, including the constitution, organization, and maintenance of territorial courts of civil jurisdiction, including procedure therein, but not including the appointment of judicial officers, or the constitution, organization, and maintenance of courts of criminal jurisdiction, or procedure in criminal matters.

(*i*) The defining of the powers, duties, and obligations of sheriffs and clerks of the courts and their respective deputies.

(*j*) The conferring on territorial courts of jurisdiction in matters of alimony.

(*k*) The imposition of punishment by fine, penalty, or imprisonment, for enforcing any territorial ordinances.

(*l*) The expenditure of territorial funds and such portion of any moneys appropriated by Parliament for the Territory as the Commissioner is authorized to expend by and with the advice of the Council or of any committee thereof.

(*m*) Generally, all matters of a merely local or private nature in the Territory.

The powers of the Commissioner in Council as in the North-West with regard to these questions are not to exceed those given to Provincial Legislatures under the provisions of s. 92 of the *British North America Act*, 1867.

[1] *Rev. Stat.*, 1906, c. 63; cf. 2 Edw. VII. c. 34. The Minister of Justice, in a report of December 11, 1899 (*Provincial Legislation*, 1899–1900, p. 155), questions the power of the Commissioner to enact retro-active ordinances.

The Commissioner in Council shall pass Ordinances in respect to education,[1] but every such Ordinance must provide that a majority of the ratepayers of any district may establish such schools and assess such rates as they think fit, and the minority may establish separate schools and pay rates in respect of them only. Electoral matters can be regulated by Ordinance. Male adult suffrage exists.

Any such Ordinance may be disallowed by the Governor-General in Council at any time within two years.

The Governor-General in Council (that is, with the advice of the Privy Council of Canada) can also make temporary Ordinances for the peace, order, and good government of the Yukon Territory,[2] and the laws of the Parliament of Canada, unless otherwise provided in each law, apply to the Yukon Territory, but the Governor-General in Council has power to apply to the Yukon laws not otherwise in force.

§ 11. Boundaries

The Province of Manitoba, which as originally created was of small size, say 13,500 (49°–50° 30′ N., and 96°–99° W.) square miles, was greatly extended by an Act of the Dominion Parliament, 44 Vict. c. 14, which placed the boundaries at 49°–53° N. and 90°–101° W. longitude, thus increasing the size of the province to 73,956 square miles. But Manitoba lost some territory to Ontario, which on its part had a long dispute with the Dominion as to its limits. In 1878 there was an agreement to arbitration, the arbitrators being, for Ontario the Chief Justice, for the Dominion Sir Francis Hincks, and as a third arbitrator Sir Edward Thornton, the British Minister at Washington. The decision of the three

[1] Cf. No. 27 of 1902, and *Provincial Legislation*, 1901–3, p. 122. For the powers of the Yukon Council *re* liquor, see ibid., p. 123.

[2] No Ordinance extends beyond the end of the next parliamentary session, unless it is approved by Parliament; it cannot impose a tax save in connexion with gold- or silver-mining or a duty of customs or excise or appropriate public lands, and every Ordinance must be published for four weeks ere it comes into force; see ss. 16, 17 of *Rev. Stat.*, c. 63.

was issued in due course,[1] and adopted by an Ontario Act of 1879,[2] but the Dominion was not pleased and did nothing. In 1884 it was agreed to have a reference to the Privy Council, but the Dominion Government withdrew, leaving the matter to Ontario and Manitoba. The Judicial Committee was pleased to point out that the award was not binding, as legislation was necessary to give it effect, but they laid it down that the line suggested in the award was practically correct so far as it related to the line between Manitoba and Ontario. They considered, without expressing a final opinion as to the sufficiency of concurrent legislation by the provinces and the Dominion to settle the new line, that an Imperial Act should be passed to settle the issue.[3] In 1889 [4] this was done on address from the Parliament of Canada.

The boundary of Quebec is defined by concurrent Acts of that province and the Dominion of Canada, passed in 1898.[5]

It has been long discussed in the Canadian House of Commons how to divide among the existing Provinces of Manitoba, Ontario, and Quebec the vast lands to the north of them, which are so sparsely populated and so destitute of natural resources as to promise little chance of provincial development at an early date. Hitherto all efforts to settle the matter have failed, owing to disagreements between Manitoba and Ontario as to the boundary between the extensions of territory as regards Hudson's Bay.[6]

[1] Canada *Annual Register*, 1878, pp. 189–94.

[2] 42 Vict. c. 2.

[3] See Biggar, *Sir Oliver Mowat*, i. 369–423. Cf. Canada *House of Commons Debates*, 1885, pp. 17, 18, 23.

[4] 52 & 53 Vict. c. 28; Canada *House of Commons Debates*, 1889, pp. 1654–8. The New Brunswick boundary rests on 14 & 15 Vict. c. 63 and 20 & 21 Vict. c. 34.

[5] Quebec Act, 1898, c. 6; *Rev. Stat.* 1909, c. 2; Canada, 61 Vict. c. 3. These Acts are valid by 34 & 35 Vict. c. 28.

[6] *Canadian Annual Review*, 1905, pp. 92, 356 seq.; 1907, pp. 506, 563 seq.; 1908, pp. 464–8; 1909, pp. 502–4; 1910, pp. 465–8; Manitoba *Sess. Pap.*, 1910, No. 5. In 1911 also the negotiations failed: *Times*, March 22, 1911; *Canada Gazette*, xliv. 3210–2.

§ 12. The Alteration of the Constitution

Very different principles apply to the alteration of a constitution which is the result of a federal compact from those which apply to the alteration of an ordinary constitution. As was recognized in an ample manner in 1907, on the occasion of the amendment of the *British North America Act* in accordance with the wishes of the Federal and Provincial Governments in the matter of the financial subsidies to the provinces, the Act is a formal instrument of constitution which can be amended by the Imperial Parliament, and will so be amended, but only in accordance with the wishes of the people of the Dominion as a whole, not at either federal or provincial bidding.[1] Of course, this is not to say that the Constitution is rigid in an extreme sense: the Imperial Parliament can by a simple Act alter every and any part of it, and there is no chance of such disadvantages resulting as have resulted in the United States, where the Federal Government has admittedly too little power to enforce matters of external affairs affecting the subjects committed by the Constitution to the provinces, as was seen in the affair of the riots at Vancouver on the Pacific coast in 1907,[2] against Asiatics, when the Imperial Government found that the Dominion Government had adequate means to procure full satisfaction to the parties aggrieved; while for a long time the situation in California remained extremely grave. On the other hand, it should be noted that the Constitution itself gives adequate powers for ordinary alteration of those points which can be considered of real importance: for example, the Dominion Parliament was given by the Acts of 1871 and 1886 power to provide adequately for the government of the new provinces to be created, and of territories not in the provincial system, and for the representation of both provinces and territories in the Parliament of Canada, although in the original Act no adequate provision was made in these regards. Further, the Canadian Parliament can decide all

[1] British Columbia *Sess. Pap.*, 1908, C. 1.

[2] *Canadian Annual Review*, 1907, pp. 384–9.

matters regarding the electoral franchise, and in 1885 it did create a Dominion franchise, which, however, was abandoned in 1898, though subsequently there have been taken certain powers as to electoral matters, as the opposition Provinces of Ontario, Manitoba, and British Columbia have been accused of gerrymandering constituencies in the interest of the Opposition.[1] On the other hand, the Parliament cannot [2] interfere with the principle laid down in s. 51 of the Constitution, under which the readjustments of representation take place, and under which Quebec must have sixty-five members, and each of the other provinces a number bearing to the population as ascertained at each decennial census the same proportion as the number of the members of Quebec bears to the population of that province, a fraction of over a half counting as one, a fraction of a half or under counting as *nil*. On the other hand, it is laid down that the representation of any province shall not be reduced unless the population has diminished in proportion to the number of the population of the Dominion as a whole in a proportion of a twentieth since the last census. The Parliament can, however, increase the quota for Quebec, but it must also increase all the other figures in proportion.

On the other hand, the Parliament cannot alter fundamental things : thus, it cannot alter the constitution of the executive power in ss. 8–11, 13–15, which are fundamental, though it can vary the mode of execution of executive powers existing at the Union, and vested *pro tem.* in the Governor-General, and it cannot change the seat of government, a power reserved for the Crown. It cannot alter a single provision regarding the Senate except that it may alter the quota of members necessary for a quorum. It cannot alter the provisions as to the existence of a House of Commons, or the other rules regarding it, save as expressly

[1] *Canadian Annual Review*, 1908, pp. 48–54 ; see Act 7 & 8 Edw. VII. c. 26.

[2] Cf. 33 S. C. R. 475 and 594. The principle is applied by the Orders in Council and Acts applicable to the other provinces ; see Orders in Council of May 16, 1871 (British Columbia), June 26, 1873 (Prince Edward Island) ; 33 Vict. c. 3, s. 4 ; 4 & 5 Edw. VII. c. 3, s. 6 ; c. 42, s. 6.

mentioned above. It cannot alter the relations between the Houses, or the rules as to the recommendation of Money Bills by the Governor-General, and their origination in the Lower House; it cannot alter the rules regarding the Speaker, though it can make provision for the filling of the chair in the absence of a Speaker;[1] it cannot change its own quorum, nor can it deprive the Speaker of his casting vote in case of equality of votes. It cannot alter the provisions as to the royal assent to and the reservation of Bills.[2]

Nor can the Parliament affect in any way whatever the provincial constitutions or the division of powers between the Federation and the provinces. On the other hand, the provinces each possess the full right of altering their constitution except as regards the office of Lieutenant-Governor. This power is given by the Imperial Act, and confirmed to each new province by the terms of its Constitution Act, which by the Imperial Act of 1871 is declared unalterable by the Dominion. The only power of the Dominion with regard to the alteration of the provinces is that of changing boundaries and the necessary consequential legislation, contemplated in the Act of 1871,[3] which is conditional on the assent of the province affected, and was exercised in the case of the Quebec boundary in 1898.

The only limitation on the power of alteration in the provinces is that in s. 80 of the *British North America Act* under which the Quebec Legislature shall not alter the limits of any of the electoral districts referred to in the second schedule to the Act, unless the second and third readings of the Bill have been passed in the Legislative Assembly with the concurrence of the majority of members representing all those electoral divisions or districts, and the

[1] The Act for a Deputy Speaker (57 & 58 Vict. c. 11) was validated by 59 Vict. c. 3; see *Provincial Legislation*, 1867–95, pp. 1314–23.

[2] There were a few dicta which might seem to point to a power of constitutional change in *Fielding* v. *Thomas*, [1896] A. C. 600, but they cannot be pressed; see Lefroy, p. 699, n. 1.

[3] The exact wording of this Act has been thought to limit the power of the Legislature of Manitoba, but the better opinion is otherwise; see *Provincial Legislation*, pp. 806 seq.

assent of the Crown cannot be given to any such Bill until the Legislative Assembly has presented an address to the Lieutenant-Governor, reciting that the assent of such majority has duly been given, and the instructions to the Lieutenant-Governor remind him of the obligation. This clause was inserted at the desire of those who wished to secure for the districts in question, which were in part British and not French, that their votes should not be swamped by their merger with other French-Canadian districts.[1] This express provision must override, it would seem, the general power to amend given by s. 92 (1) of the Act of 1867, which allows the amendment from time to time, 'notwithstanding anything in this Act,' of the constitution of the province, except as regards the office of Lieutenant-Governor. But though such an Act, which merely changed the districts, would require to be so passed, it does not seem that an Act abolishing the proviso itself could need more than ordinary majorities, in which case the proviso could first be repealed and then the Act passed. The position has not yet arisen, for the main change made in the constitution by the province is the increasing of the period of the Legislature to five years in place of the four contemplated in the Act of 1867. The other provinces have also changed their constitutions: in New Brunswick the Upper House has disappeared by an Act of 1891, and in Prince Edward Island the same fate has befallen it by an Act of 1893; in Manitoba it went in 1876, after a brief existence of six years. In British Columbia the constitution from being a Crown Colony one was before federation made by local Act representative, it being agreed in the articles of union[2] that this would be the case.

[1] They are now mainly French, *Times*, June 24, 1911.

[2] This is an interesting case, according to Lefroy, p. 749, n. 1, for before union the province, having a non-representative legislature, had no power of alteration; the power was then given by the Order in Council approving the union, which has, under 30 Vict. c. 3, the force of an Imperial Act. But this is an error; by Order in Council of August 9, 1870, a representative legislature was constituted under the authority of 33 & 34 Vict. c. 66, and responsible government was created by Act No. 147, 1871.

In Nova Scotia,[1] New Brunswick, and British Columbia the number of executive councillors is actually limited by law to nine and seven (eight by Act c. 10 of 1911) respectively, and in the latter case all but six (now seven) are ministers with departments and salaries, and the seventh is President of the Council, so that if only a parliamentary tenure of office was required there would be a responsible ministry, necessarily parliamentary, but this is not the case. Freely have the provinces exercised their powers as regards the size of the Houses and similar matters, such as the franchise. Of course the power is not absolute, for it is clear that the power to amend supposes the existence of something, and does not in such a case (this is shown by the retention of the office of the Lieutenant-Governor beyond provincial control) render the Legislature competent to abolish the Legislature, but in all probability this limitation applies also to a Colony.

The power of constitutional alteration, the power of legislation which is within limits exclusive, and the growth of population, have strengthened the provinces of late years, as is shown by the fact that the Federal Government is more and more chary of dealing with things except through the aid of the provinces, as has been shown in its reluctance to accept treaties on provincial subjects without full control, and by its asking the Provincial Governments to agree to its appointing a Royal Commission on education, to which they all consented, waiving the constitutional objection on the grounds of the desirability of such a subject receiving common treatment, and by associating them in the proposals for considering natural resources. If the Dominion controls them by its power of veto, they deny, as Ontario has denied,

[1] This is a continuation of the old system in which the royal instructions provided for a maximum of nine members, a maximum already fixed in the Governors' commissions of 1764 and 1784. There has been no legislation in Prince Edward Island, and the maximum therefore remains undefined in virtue of the continuance of the constitution as it existed in 1872 under Lord Dufferin's letters patent and instructions by the Order in Council for union in 1873. In New Brunswick *Rev. Stat.*, c. 10, the number is not limited.

its right to veto any law *intra vires* the provinces, and in effect the Dominion Government has yielded. The rising spirit of Ontario has been seen in the regret publicly expressed in a recent speech by Sir James Whitney, the Premier, that the province cannot appoint an Agent-General in England who can correspond directly with the Imperial authorities, but must go to them through the High Commissioner. The secret of this consciousness of strength is obvious : the people of Canada and the Federal Parliament cannot change the Constitution of Canada, however much they desire it, or deprive the provinces of any of their powers, unless the Imperial Government agree, while in the Commonwealth the powers of the states can be and are gradually being taken from them by the federal electors.

The truly federal character of the Constitution is undoubtedly due in great measure to the decisions of the Privy Council which has corrected the earlier tendency of the Supreme Court to interpret the powers of the provinces in a restricted sense. But great part of the credit of maintaining provincial rights against the unificationist tendencies of Sir John Macdonald must be ascribed to Sir O. Mowat, who was determined that federation should mean for Ontario freedom in internal matters. His tenure of office saw the successful assertion of the powers of the provincial legislatures to define their privileges,[1] the admission of their right to confer on the Lieutenant-Governor the power of pardon,[2] the acquisition for the provinces of the right to escheats,[3] the settlement of the Ontario boundary,[4] the declaration of the provincial title to the freehold of the Indian lands,[5] the upholding of the provincial right to regulate the liquor trade,[6] and the disuse of the federal veto as regards acts not unconstitutional.[7] In the later years of his career he had the support of Sir John Thompson, perhaps Canada's greatest lawyer, who respected the Constitution too greatly to seek to upset it even on federal grounds.[8]

[1] Above, p. 696. [2] Above, pp. 680, 681. [3] Above, pp. 679, 680.
[4] Above, p. 770. [5] Above, p. 684. [6] Above, p. 676.
[7] Above, pp. 738, 739. [8] Cf. Willison, *Sir Wilfrid Laurier*, ii. 208–10.

CHAPTER II

THE COMMONWEALTH OF AUSTRALIA

§ 1. The History of Federation

The Constitution of the Commonwealth presents in all essentials a very different aspect to that of the Canadian Dominion. It is a constitution arising from different needs and animated by a different spirit. In the case of the Dominion there can be no doubt that much stress was laid on the advantages of adopting a system of polity which would strengthen the British power in North America against the United States; the fact that the term kingdom of Canada could not be adopted has been long attributed to the wish of the Imperial Government not to annoy uselessly the republicans south of the boundary by insisting on the monarchical principle as being part of the Constitution of the Dominion.[1] In Australia all was different; there was no foreign pressure of a strong and somewhat jealous neighbour with alleged designs on the integrity of the Dominion; if the echoes of the Russian war in the Crimea and the fear of Russian intrigues in Afghanistan in 1877–8 aroused for the time being a martial spirit among the people of the Commonwealth, there was not sufficient impetus in that to carry federation, and though no doubt the desire for a more effective defence played a part in the demand for federation, it would be idle to deny that the immediate outcome of federation was certainly not the increase of the strength of the military or naval forces, but rather their decrease at once in numbers and in efficiency. This is now being changed in its

[1] Bourinot, *Constitution of Canada*, p. 47, n.; cf. also the annexation resolution in Egerton and Grant, *Canadian Constitutional History*, p. 339; Pope, *Life of Sir John Macdonald*, i. 71, 72. For the history of federation in Australia, see Quick and Garran, *Constitution of Commonwealth*, pp. 79–252; Harrison Moore, *Commonwealth of Australia*[2], pp. 17–64. See also Egerton, *Confederations and Unions*, pp. 189–230.

entirety, but it shows that there would be much danger in overstressing the importance of military or naval considerations in the causes which led to the formation of the Commonwealth.

The main driving power towards federation was trade and customs.[1] In the early years after the introduction of representative government, Sir Charles Fitzroy suggested, in a dispatch of September 29, 1846, that there should be a Governor-General to consider the different Acts on these questions of the several Colonies. Lord Grey and the Privy Council Committee on Trade and Plantations in 1849 approved the proposal, and in the Act of 1850, as introduced, it was proposed to set up a Federal Legislature consisting of delegates elected by the Colonial Legislatures—twenty to thirty in number—to enact a tariff for all the Colonies (the New South Wales tariff being taken as the tariff until this was done), and to entrust to it such matters as postal business, road and railway transit, shipping, harbours and light dues, weights and measures, and matters referred to it by all the Colonies, and to enable it to raise a revenue for its needs, and to establish a Supreme Court. The proposal to which Lord Grey was devoted was rejected by both English and Colonial feeling, and in the Lords the clauses were dropped and the Bill which was needed to create the Colony of Victoria was allowed to pass. Lord Grey, however, could create a central executive, and he did so in 1851 by appointing Sir C. Fitzroy to be Governor-General (including Western Australia in his commission) and also Governor of each of the provinces separately by four separate commissions (excluding Western Australia), so that he could in any one, if he desired, administer the government by going there ; he stayed, as a matter of fact, in New South Wales, but the Lieutenant-Governors were told to correspond with him. But Lord Grey left office in 1852, and in 1855 the Lieutenant-Governors became Governors, the separate commissions were abandoned, and

[1] New South Wales in 1842 tried to give free trade to Tasmania and New Zealand, but the Act was disallowed, and a dispatch of June 28, 1843, laid down that the Imperial Government disapproved of differential duties.

in 1861 the commission to the Governor of New South Wales as Governor ceased to be accompanied with one to make him titular Governor-General. In the Colonies, however, Wentworth in Australia until 1854, and later in England, Deas Thomson in New South Wales, and Gavan Duffy in Victoria, were anxious to secure some federal system of an elected assembly for common purposes, a forerunner of the Federal Council of Australasia, and from 1853 there was a good deal of activity in this direction, but the Acts of 1855 giving constitutions to New South Wales and Victoria contained no federal provisions. In 1860 a Conference was arranged, but a change of Ministry in New South Wales, and the reluctance of the newly formed Colony of Queensland, ended its prospects, and the Conference which considered tariff matters in 1863 declined, without instructions, to discuss federation. Yet the tariff difficulties in Colonies with land frontiers were very great; in 1855 an agreement was made between Victoria and New South Wales to allow free transit over the Murray, while goods paid duties at Adelaide for entry either to New South Wales or Victoria, and the proceeds were divided equally, but in 1864 New South Wales terminated the agreement, which was renewed, but modified, in 1865–7, and it ended in 1873. A proposal by South Australia in the direction of internal free trade made in 1862 received practically no favour. In 1873 the Imperial Parliament removed the legal bar which had hampered the introduction of a Customs Union by allowing the Colonies to differentiate against the rest of the world in favour of the other Colonies or New Zealand, but by this time Victoria had gone far on her career of high protection, and was only willing to come into a scheme which gave her manufactures free entry into the rest of Australia, and denied their agricultural products free entry into that colony,[1] and an Act of New South Wales in 1876 to encourage border conventions remained fruitless.

[1] See *Parl. Pap.*, C. 576, 703, and 36 & 37 Vict. c. 22. For the Murray Acts, New South Wales, 19 Vict. No. 21; Victoria, 17 Vict. No. 17; South Australia, No. 6 of 1856. The New South Wales tariff was applied in 1857 to these goods.

A Federation Bill was introduced into New South Wales by Mr. Parkes in 1867, but did not receive the royal assent.

Foreign relations also caused anxiety : in 1870 Mr. Gavan Duffy induced Victoria to appoint a Royal Commission which suggested the remarkable and absurd scheme that the Mother Country should give the Colonies rights of treaty-making, and that it should secure for them a position as neutral sovereign states.[1] The idea was a singularly inept one, and was justly derided by their opponents at the time. Attention was, however, drawn to the new policy of France in transporting criminals to New Caledonia which began in 1864, while transportation ceased in Western Australia in 1867 ; Fiji was annexed to please Australia by the Crown in 1874, and created a Crown Colony, while in 1878 an agreement saved what remained of British interests in the New Hebrides. The intervention of the United States became marked in Samoa in 1875, and Germany was also active in these islands. In 1880–1 a conference at Melbourne, and later at Sydney, marked a real advance towards agreement.[2] In 1883 the desire for union was strengthened by the question of New Guinea. The Government of Queensland purported to annex the island, and when the act was disavowed the Secretary of State pointed to federation as a means of strengthening the Colonies in their desire to obtain the control of the Pacific. This was followed, through the exertions of Mr. Service, Premier of Victoria, by the conference at Sydney of November 1883, which was the first to consider federation. It included representatives of New Zealand and of Fiji, beside those of the six Colonies, and decided in favour of a Monroe doctrine for Australia, protested against the introduction of convict labour, and asked for the annexation of New Guinea, and the securing the control of the New Hebrides. This conference decided to promote a Bill

[1] Victoria *Parliamentary Papers*, 1870, Sess. 2, ii. 247. There was no second report. The idea was revived in 1911 by the *Volksstem* in South Africa.

[2] New South Wales *Legislative Assembly Votes and Proceedings*, 1881, i. 329. Victoria (*Assembly Votes and Proceedings*, 1880–1, iv. 459), Queensland, and New Zealand would not accept a Federal Council then.

for a Council which should deal with marine defences, the relations of Australia with the Pacific Islands, the influx of criminals, quarantine, and generally whatever topics were referred to it by the Legislatures of the Colonies. It was agreed that they could not then recommend a true federation, but this Council would serve a useful purpose. In July and August 1884, all the Colonies except New South Wales [1] and New Zealand agreed to the measure and adopted addresses to the Imperial Government, asking for an Act which in 1885 became law as the *Federal Council of Australasia Act* [2] (48 & 49 Vict. c. 60).

The functions accorded to this remarkable body were limited [3] and the essential and most curious feature of all

[1] Parkes had now definitely decided that federation should be allowed to come in a complete form, and that a Council would be a 'rickety body'.

[2] Mr. James Bryce opposed the Bill in the Commons; Lord Carnarvon favoured it in the Lords. Leave was given to other Colonies to join, and the Crown was given power to increase the number of members, fixed at first at two for each self-governing and one for each Crown Colony.

[3] It could legislate on the following subjects, and the Acts passed are mentioned in brackets:—

1. Relations of Australasia with the islands of the Pacific.
2. Prevention of the influx of criminals.
3. Fisheries in Australasian waters beyond territorial limits (51 Vict. No. 1, Queensland; 52 Vict. No. 1, Western Australia).
4. Service of civil process beyond the Colony in which it was issued (49 Vict. No. 3).
5. Enforcement of judgements of any Colony beyond its limits (49 Vict. No. 4; 54 Vict. No. 1; 60 Vict. No. 2).
6. Enforcement of criminal process beyond the Colony in which it was issued and extradition of offenders.
7. Custody of offenders on vessels belonging to the Colonial Governments beyond territorial limits.
8. Any matter referred to the Council by the Crown at the request of the Colonial Legislatures.
9. Any matter of general Australasian interest referred to the Council by two or more Legislatures (Garrisons of Thursday Island and King George's Sound, 56 Vict. No. 1; and Naturalization, 60 Vict. No. 1).
10. Questions of the relations of two or more Colonies referred by the Governors with the assent of the Legislatures.

Assent was to be expressed by the Governor of the Colony where the

was that it had no executive or judicial power, though the creation of an Australian Court of Appeal had been in the air since 1861, in great measure in consequence of the trouble and expense of carrying appeals home from such distant Colonies. Moreover, membership was strictly optional, and only Victoria, Queensland, Tasmania, and Western Australia sent members, as a rule, to its meetings, while Fiji dropped out after the first meeting, and New South Wales and New Zealand held aloof. Moreover, the jealousy of the powers of the Council, which was merely composed of representatives nominated by the Legislature, who were all ministers up to 1895, when an Order in Council under the Act in 1894 enlarged its numbers, prevented it having any authority to raise a revenue or expend money. It met in 1886 and passed laws regarding the enforcement of judgements beyond the limits of each state ; in 1888 it regulated the pearl-shell and bêche-de-mer fisheries in Australian waters beyond the territorial limits of Queensland. In 1889 it passed a similar Act for Western Australia ; on this occasion only Southern Australia being present under the authority of the temporary Act passed by its Parliament in December 1888 :[1] in 1891 its sole activity consisted in an Act for the recognition of orders in lunacy by the Supreme Courts of one state in the Courts of the others. On this occasion alone Western Australia failed to attend. In 1893 it passed an Act to regulate the garrison of King George's Sound and Thursday

Council sat, and he could reserve Bills, and must reserve all Bills of classes 1–3, if not previously approved by the Crown. The laws of the Council were to override Colonial laws, and the Council could make representations to the Crown on matters of general interest or the relations of the Colonies with the possessions of foreign powers. It had to meet once in two years at least, being summoned by the Governor of the Colony in which it had decided to hold its next session ; a special session could be held on a requisition from the Governors of three Colonies. Questions were decided by individual votes, the President having also a casting vote (ss. 10, 11).

There were passed also an Interpretation Act (49 Vict. No. 1) and an Act to facilitate the proof of Acts of Parliament, signatures of officers, &c. (49 Vict. No. 2) ; see Quick and Garran, op. cit., p. 377.

[1] Mr. Holder tried to rejoin in 1892, but the Upper House refused to accept the Bill.

Island, and it passed an address seeking for the extension of the number of representatives from each Colony except a Crown Colony, and by Order in Council of March 3, 1894, issued after addresses had been passed by the several Legislatures, the Crown increased the number to five from each Colony in place of the two originally provided. In 1895 there was no legislation, but resolutions were passed in favour of uniform company banking and quarantine legislation, and of the appointment of a representative of the Australian bench on the Judicial Committee of the Privy Council. This was carried into effect after the passing of an Imperial Act by the elevation to that place of the Chief Justice of South Australia, the distinguished lawyer, Sir Samuel Way. In 1897 Acts were passed at the request of Victoria and Queensland, providing for the mutual recognition of naturalization, and on the request of all four Colonies for the enforcement of orders of the Supreme Courts for the production of testamentary instruments. Its last meeting was in January 1899 at Melbourne.[1]

Meanwhile the movement for a true federation was actively proceeding. There had been repeated intercolonial conferences to discuss affairs of general interest since the beginning of Colonial responsible government, and, in addition to more formal ministerial conferences, experts met on technical points like military defence, postal arrangements, and so on. Defence [2] now intervened towards union, for in 1887 at the Colonial Conference in London, Australia, as a whole, definitely assumed responsibility for a subsidy of £226,000 a year towards the expense of a separate squadron on the Australian station. It was, as regards military matters,

[1] The Council never showed any hostility to the movement for a real federation.

[2] In 1878 Lieutenant-General Sir W. Jervois reported on defence, with the result of increased expenditure and fortifications. In 1881 the Sydney Conference adopted responsibility for land defence, but thought the Imperial Government should accept responsibility for naval defence; this, however, was considered unreasonable by Lord Carnarvon's Royal Commission in a report of March 23, 1882. In 1885 Sir G. Tryon negotiated in Australia, with the result that in 1887 agreement was possible.

agreed that an Imperial officer should inspect the military forces of Australia. Then trouble began, for Sir H. Parkes withdrew from the arrangements for the visit, and eventually the Imperial Government sent out in 1889 their own officer, Major-General Sir J. Bevan Edwards, who inspected and reported on October 9, in effect urging federation for defence reasons. This served as a text to Sir H. Parkes, who was now fired with a fit of federal enthusiasm, and a conference of accredited delegates was held in February 1890 at Melbourne to pave the way towards federation. It was followed by a conference[1] at Sydney in March–April 1891, which passed resolutions laying down the basis on which federation must proceed. It was agreed that only so much power was to be handed over to the federal body as was necessary for the purposes of federation ; that no state should be divided without its consent ; that there should be free trade throughout the states, and that there should be one customs tariff, and that military and naval defence should be a federal matter, and committees were appointed to draft a federal constitution which now forms the basis of the Constitution of the Commonwealth of Australia. It was also agreed that the procedure to be adopted was that each Parliament of the Colonies should consider the draft Constitution, and if three accepted it the Imperial Government should be asked to enact it for those which accepted it. But there was unexpected delay in carrying out the scheme. In New South Wales Sir H. Parkes found himself in political difficulties,[2] and, though he managed to carry on for a time, his resignation was succeeded by the advent to office of Mr. Dibbs, who was rather in favour of a union, and suggested in 1894 a scheme to unify the Colonies of New South Wales and Victoria,

[1] Seven delegates from each Colony were sent (three by New Zealand)—usually five of the Assembly and two of the Council—under the authority of local Acts passed in 1890 (in Western Australia in February 1891).

[2] Mr. Reid condemned the draft for the excessive powers of the Senate and the omission of any provision rendering essential responsible government. Queensland, Western Australia, and New Zealand did nothing. Cf. Jenks, *Government of Victoria*, pp. 389–96, who advocated the abandonment of responsible government (cf. pp. 375–84).

which, however, was dismissed with little attention. Meanwhile, however, a new spirit was manifested in the country; the Australian Natives' Association developed in 1890 a strong propaganda in favour of federalism, and a meeting at Corowa in 1893 showed that the matter was passing out of the hands of the Governments into those of the people.

The Premiers' Conference at Hobart of January 1895 marked a further step in the process. The Premier of New South Wales suggested, and the conference accepted, a resolution that federation was an urgent question, that ten delegates chosen by the electorate from each Colony should draft a constitution, that this constitution should be submitted to a direct vote of the electors in each state, and that Bills for this purpose should be introduced into the several Parliaments. A Federal Enabling Bill was drafted and passed in five of the Colonies, in New South Wales and South Australia in 1895, and in the rest in 1896, excluding Queensland, where a divergence of opinion between the Houses caused the Bill to be lost. In New South Wales and Victoria the number of the majority in favour of federation was to be 50,000, raised by Act No. 34 of 1897 in the former to 80,000, in Tasmania and Western Australia 6,000, while South Australia was ready to accept a simple majority. Western Australia provided for the choice of the members of the convention not by popular election as did the others, but by nomination by the members of both Houses of the Parliament sitting together and voting by ballot, and made the reference of the Bill conditional on the approval of Parliament. The convention thus appointed met at Adelaide in March 1897, and the Bill then drafted was in substance that of 1891, but there were sharp fights over questions of financial relations. Then the Bill was remitted to the consideration of the Legislatures, and in September the Convention reassembled at Sydney to consider the suggestions thus made. The larger Colonies desired more deference to the wishes of population and less to state rights, while the lesser states fought to secure their autonomy. The conflicts centred in the position and mode of selection of the Senate. Finally

the scene was shifted to Melbourne, where in 1898 the draft was agreed on, the financial problem being disposed of by the famous Braddon clause, and the matter was referred to the Parliaments of Australia. Queensland and Western Australia, however, did nothing, and in New South Wales there was much trouble, as the opposition to the federation had grown strong among various parties. There was a democratic opposition to the representation of all states equally in the Senate, to the financial arrangements, which would penalize the state in favour of Tasmania and Western Australia, and to the change in customs policy which was clearly inevitable.[1] Therefore, though federation was accepted by a majority, it fell far short of the majority required, which had been increased in 1897 to a total of 80,000 votes.[2] Hence federation seemed blocked, for though the other three Colonies accepted it, it could not be real without New South Wales. After a general election there, Mr. Reid proposed in August 1898 to the Assembly certain modifications of the agreement, which with changes it accepted as adequate. A conference of Premiers held on January 29, 1899, at Melbourne,[3] saw the acceptance of the following modifications in favour of the views of New South Wales: (1) the lessening of the rigidity of the constitution by substituting an absolute majority of the members of the two Houses for a three-fifths majority in the case of a joint sitting arising out of a deadlock; (2) the limitation of the operation of the Braddon clause to ten years only, with power to the Parliament to amend thereafter at will; (3) the insertion of a clause permitting the Parliament to grant financial aid

[1] The Labour party also objected to the rejection of the referendum for settling deadlocks.

[2] The voting in the Colonies for the Bill and against was as follows: New South Wales, 71,595 and 66,228; Victoria, 100,520 and 22,099; South Australia, 35,800 and 17,320; Tasmania, 11,797 and 2,716. The percentages of voters to electors enrolled were respectively 49·88, 48·94, 39·44, and 49·5. In the voting for the candidates the percentages had been 51·25, 43·5, 30·9, and 25·0 respectively.

[3] Queensland now appeared for the first time since the Hobart Conference of 1895.

to necessitous states; (4) a further guarantee of territorial rights by requiring the assent of the electors to the alteration of state boundaries, and a special provision for Queensland; (5) the application of the deadlock clauses to the amendment of the constitution itself. Moreover, a private agreement was come to that the federal capital, which was not to be within 100 miles of Sydney, was to be near the limit; until it was chosen the capital was to be Melbourne. A new referendum was now taken under the authority of Colonial Acts; in June, New South Wales was carried for federation by Mr. Reid by 107,420 to 82,741 votes, while the other Colonies [1] repeated their votes, and Queensland in September also carried federation by 38,488 to 30,996, the south and Rockhampton opposing the Bill. Then the five Colonies passed addresses to the Imperial Government for the enactment of the Bill as an Imperial Statute, and sent home delegates to further the passing of the Bill. The Governments of Western Australia and New Zealand, which had held aloof since 1891, also sent in memoranda asking for a right to join, and in the case of Western Australia pressing for various customs concessions, and the promise of a transcontinental railway, basing this request on the analogy of the procedure which led to the inclusion of British Columbia in the Dominion.

At home the discussion turned almost wholly on the terms of the clause relating to appeals.[2] It was proposed by the Bill as drafted to exclude all appeals from the High Court

[1] Victoria by 152,653 to 9,805; South Australia, 65,990 to 17,053; Tasmania, 13,437 to 791.

[2] The *Commonwealth of Australia Constitution Bill* (Wyman & Sons, London, 1900) contains the negotiations and Imperial debates on the Bill; see also Quick and Garran, pp. 228–52; Clark, *Australian Constitutional Law*, pp. 335–57. The other points were less important: the delegates admitted that the Commonwealth laws were subject to the *Colonial Laws Validity Act*, 1865, and the provisions as to merchant shipping (s. 5) were discussed and left to stand. New Zealand asked to be given a right to join, an appeal to the High Court without joining, and joint power as to naval and military defence. See also *Parl. Pap.*, C. 6025, 6466; Cd. 124, 158, 188. The Adelaide, Sydney, and Melbourne Debates are all printed.

of Australia in matters affecting the interpretation of the constitution of the Commonwealth or a state save where the public interests of some other part of Her Majesty's Dominion were concerned. The proposal was unsatisfactory, and the retention of the full right of appeal or of appeal at the instance of the executive government was suggested instead. An application by the Secretary of State to the Chief Justices of the Colonies resulted in their pressing the desire for the retention of the appeal, while a conference of Premiers, while deprecating the change, thought change better than postponement of the Bill. Moreover, Queensland separated itself from the other Colonies and deprecated the exact wording of the Bill. A compromise was arranged limiting the withdrawal of appeal to cases concerning the relations *inter se* of the Commonwealth and the States, or of the several states, and permitting the High Court to allow an appeal in such cases. The Bill then became law as the Act 63 & 64 Vict. c. 12. At the urgent request on April 27 of Mr. Chamberlain, Western Australia hastened to join, a referendum giving 44,800 for to 19,691 against. The federation took effect from January 1, 1901, the Governor-General being appointed in September 1900, after the issue of the proclamation of September 17, fixing the date of the establishment of the federation as January 1, 1901.

The slow birth of the Commonwealth is indeed remarkable. The Colonies seemed destined for union : so much was shared in common, there were so few serious distinctions between the peoples, and religious animosity had no place at all in the Colonies. But defence was not urgent, and the local interests in trade tended to develop jealousies, of which the Queensland *Railway Border Tax Act*, 1893, preserves in its preamble a noteworthy example ; it recites the moneys spent by the Government of the Colony on its railways and on its establishing a steamer service with Great Britain, and then proceeds to denounce the other Colonies for adopting a differential tariff in railway rates in order to divert traffic from Queensland lines, and it enacted a tax of £2 10*s*. a ton on all produce conveyed across the border,

with severe penalties for any infringement. Moreover, the rivalry of the great cities of Melbourne and Sydney played a part, and the cities were really for most purposes, as a result of the congestion of population therein, the colonies. The tariff divided further both New South Wales and Victoria, and the people were strangely apathetic to the subjects dealt with by federation; Australia had not yet produced that most remarkable product, a militant Labour party, and at the several referenda and elections the number of votes cast was only about 50 per cent.[1]

§ 2. The Commonwealth and the States

The fundamental basis of the Commonwealth Constitution is the creation of a new entity in the shape of the Commonwealth Parliament, which is dealt with in chapter one of the Act, an executive dealt with in chapter two, a judicature in chapter three, while finance and trade are dealt with in chapter four. A short fifth chapter deals with the states, and the sixth and seventh chapters contain but a few sections dealing with new states and with the seat of government, and the appointment of deputies by the Governor-General. A final chapter deals with the alteration of the constitution. Unlike the *British North America Act*, it has no creative power as regards the states at all, and it makes no alteration in their constitutions,[2] save by way of creating an authority with power in some degree exclusive of the powers granted to the states, in some degree co-extensive with, but paramount over, these powers. The Dominion

[1] Cf. Harrison Moore, *Commonwealth of Australia*,[2] p. 62. The Duke of York opened the first session of the Legislature (for a needless criticism see Clark, *Australian Constitutional Law*, pp. 352, 353; and cf. Tasmania *Parl. Pap.*, 1909, No. 14), and so the Duke of Connaught in the case of the Union in 1910. Lord Hopetoun on arrival in Australia asked Sir W. Lyne to try to form a Ministry, and on his inability so to do asked Mr. Barton to do so. Lord Gladstone similarly, but more successfully, asked General Botha to form a Ministry, not giving Mr. Merriman the option.

[2] Various proposals were made on this head in the course of discussion, but never carried out.

Constitution, on the other hand, at once places all the old constitutions on a new basis by subordinating the executive head of the province to the control of the Governor-General and by subjecting the legislative power to disallowance by the Governor-General in Council. Moreover, the distribution of power is of an essentially different character in form at least; the states have all their powers save so far as they are expressly taken away, and the provinces have only such powers as are expressly left to them. It is true that the difference is more in appearance, perhaps, than in reality, for the exclusive and paramount powers deprive the states of much of their old authority, but the difference is in principle essential, and marks the dependence of the Commonwealth Constitution on the American model, which was constantly before the minds of the delegates who framed the Constitution.[1]

In the constitution of the legislative power of the Commonwealth there is, in accordance with United States models, a deliberate attempt to secure some measure of state influence. The Senate is composed of six members from each state who are elected at present by the electors—not by the Legislature, as in the United States—each state as a single constituency. Half retire every three years (those to retire being decided originally by the receipt of the lowest number of votes in each state), the tenure of office being six years. The Parliament may make laws diminishing or increasing the number of senators, but the representation of each original state shall be equal, and there shall never be less than six senators for each state which was an original state. Moreover, in the case of a casual vacancy in the representation of a state the election is to be made by the two Houses of the State Parliament sitting together, and not by the people, and the Governor in Council may appoint a senator to hold office until fourteen days after the Houses meet, if the vacancy occurs when they are not sitting. It was thought that in this way the smaller states would be able to secure power over finance and over arrangements likely to affect

[1] Cf. Clark, *Australian Constitutional Law*, pp. 358–87.

them seriously,[1] and the constitution of the Senate in this manner was very unpopular in the large states, but as a matter of fact the decision of the Federal Parliament in 1902, by Act No. 8, to establish permanently the same franchise for both Houses, and the generosity of that franchise, have resulted in the Upper House being dominated by the Labour party, which has secured the return of its nominees by more successful electoral organization than that of the other parties.[2] Plumping is forbidden, and proportionate representation has never been adopted. The Labour party, as a whole, has no sympathy for state rights, and there is no case in the ten years of its existence in which the Senate can be accused of supporting state rights, an interesting example of the futility of endeavouring to bring about results in political matters by imitation of what has proved successful under other circumstances.

The principle of state representation is maintained in a minor degree in the Lower House. The number of representatives is to be as nearly as may be double the number of senators, an important provision in view of the deadlock clauses in s. 57 of the Constitution, and is to be proportional to population. The means of securing this is laid down as follows : a quota is to be obtained by dividing the number of people of the Commonwealth as shown in the latest statistics by twice the number of senators ; then the number of members for each state is decided by dividing the population by the quota, and counting a remainder greater than a half as one member. But the states which originally joined must always have five members at least, thus reducing the risk of the complaint made by Prince Edward Island,

[1] In 1910 the Tasmanian senators turned the day against the Government in connexion with a proposal of a vote for a quarantine station near Hobart, a good example of state interests of a minor character influencing decisions; *Parliamentary Debates*, 1910, pp. 3236, 3450–8, 3582, 3583. For the theory of the Senate, see Quick and Garran, op. cit., pp. 413 seq.

[2] Cf. Harrison Moore, op. cit., pp. 111 seq. The circumstances in which a new election should take place as opposed to the filling of a casual vacancy are shown by *Vardon* v. *O'Loghlin*, 5 C. L. R. 201 ; cf. *Parliamentary Debates*, 1907, pp. 4393 seq. *Parl. Pap.*, 1907–8, No. 111, 112.

that under the Dominion Constitution she will ultimately lose all her representation.[1] It is provided that the population in those states shall not include persons of races who are restricted from exercising the franchise for the more numerous House in each state, or aboriginals (s. 127), and this will affect the population of Western Australia and Queensland, which since 1907[2] and 1905[3] have excluded Asiatics and other aboriginals from the franchise for that House. The original numbers were provided for in the Constitution Act giving to New South Wales twenty-six, Victoria twenty-three, Queensland nine, South Australia seven, Western Australia five, and Tasmania five apiece. The numbers have been since changed by adding one to New South Wales and depriving Victoria of a member, by Act No. 11 of 1905. Electoral matters and the division of the states are regulated by the *Electoral Act*, 1902–9, and the reports of the Commissions under it. Efforts to make the states control the franchise were decisively rejected in the passing of the constitution.

The provisions of the Act which affect the autonomy of the states rest first in the creation of the new body to represent all Australia. The creation alone must evidently be claimed to be more than a mere creation of a new agency; it is the calling into being of an agency to speak authoritatively for Australia whether as concerns the outside world and foreign powers, or as concerns the Empire as a whole. These two fundamental principles owe their application to the Imperial Government and have not yet won general acceptance in Australia itself, where the State Governments in differing degrees show clearly that they tend to regard the Commonwealth as rather a new entity beside the old than a new entity which includes the old and in some ways destroys the individuality of the old.[4] It is significant that the Act itself says little of this: it contains in the preamble an

[1] See 33 S. C. R. 575; [1905] A. C. 37. Cf. Quick and Garran, op. cit., pp. 446 seq.

[2] Act No. 27 of that year.

[3] Act No. 1 of that year.

[4] Cf. Harrison Moore, op. cit., pp. 295 seq.

assertion of the resolve of the Colonies to unite in one indissoluble federal Commonwealth under the Crown of Great Britain, and s. 8 of the converting Act makes the Commonwealth one Colony for the purpose of the *Colonial Boundaries Act*, 1895, but there is little else of this sort.

An interesting question arises as to the law of the Commonwealth as a whole as distinct from the laws of the several states. Is there a common law of the Commonwealth? The answer appears clearly to be as suggested by Mr. Justice Clark,[1] that there is no such common law save in so far as the prerogatives of the Crown are concerned. Even without legislation, and the provisions in the Constitution, ss. 2 and 61, are declaratory only, the Executive Government of the Commonwealth would have vested in the Crown, and therefore the whole of the common law which regulates the prerogatives of the Crown is in force in the Commonwealth. But no other part of the common law can be said so to exist in the Commonwealth. It is true that, as the expressions in the Act are all based on English law, they will be interpreted as were the provisions of the States Constitution, in the light of the English common law; but it would be a mistake to say that the common law exists in the Commonwealth as such. It is true, of course, that in each of the states the common law prevails, and in interpreting as a Court of Appeal the statutes of the states the High Court will interpret the common law, but that does not make the common law in force as a part of the common law of the Commonwealth, though within the range of the subjects committed to it it will be possible for the Commonwealth to declare that the doctrines of the common law shall apply.

In the case of *The King* v. *Sutton*[2] and *The Attorney-General of New South Wales*[3] v. *Collector of Customs*, there

[1] *Australian Constitutional Law*, pp. 198 seq.; cf. Harrison Moore, op. cit., p. 206; Quick and Garran, op. cit., pp. 785 seq., arrive at different views. The matter is mainly one of terminology: it is clear that of the cases given on pp. 809, 810, bribery of officials, voting twice at an election, &c., would be offences and punishable without any further enactment than the Constitution itself.

[2] 5 C. L. R. 789.

[3] Ibid., 818.

was exhaustively discussed the question of the relations of the Crown in the states to that of the Crown in the Commonwealth.

The point arose out of the question whether the Crown in the states was bound by the provisions of the *Customs Act* of 1901, in respect of goods imported by the Crown in the state for the use of the state.

The Government of New South Wales imported wire netting, which it was intended to distribute at a moderate cost to farmers in New South Wales, and they set up a claim in the first place that the goods were not subject to any control by the Commonwealth customs authorities, and in the second place that the goods were not subject to the duties of the customs. They relied partly on the doctrine that statutes did not bind the Crown except by express order, or necessary implication, and partly also on the provisions of s. 114 of the Constitution, which forbids the imposition of a tax upon the property of a state by the Commonwealth.

The High Court decided against the Government of New South Wales. The substance of the decision was based on the ground that for customs matters the whole control of customs must be given by the Constitution to the Commonwealth (see ss. 52 (2), 86, and 90). The Crown was the Crown in the Commonwealth.

It was laid down that the constitution binds the Crown as represented by the states, and takes no count of the states and States Governments in relation to Commonwealth legislation in matters within the exclusive control of the Commonwealth Government, and therefore, in the construction of Commonwealth statutes dealing with such matters, the rule that the Crown is not bound by statute applies to the sovereign as head of the Commonwealth Government, and not as head of the State Governments.

It was pointed out by the Court that if the principle were conceded, then the states could have made the customs laws and duties of customs illusory by importing largely and selling for the benefit of private individuals. But the decision rested in the main on the constitutional ground indicated above.

Isaacs J. said[1]:

True in a sense the Crown is one and indivisible throughout the Empire, but its power is not one and indivisible; it acts by different agents with varying authority in different localities or for different purposes in the same locality.[2] The constitution redistributed the royal authority over the territory of Australia. Formerly and subject only in the last resort to the will of the Imperial Parliament, the sovereign exerted his authority over his subjects in each separate Colony solely by his local representatives and advisers there, and with regard to all matters of legislative and executive control. The distribution of power effected by the constitution has produced this change in the position of the King, that his sovereign power is no longer exercised by means of those representatives and advisers over so large a field of subject-matters, or in some cases with the same finality. His Commonwealth representatives and advisers in all matters committed to them are now either the exclusive or the dominant depositaries of the royal authority.

Trade and commerce with foreign countries is one of those matters. Customs taxation is another. The states are still His Majesty's agents so far, for instance, as the general construction and management of railways are concerned, and for the purpose of acquiring the ownership of property destined for use in connexion with railways in their respective territories—but they are not his agents to exercise his sovereign jurisdiction with regard to the introduction of articles of commerce into this continent contrary to the declared will of the Federal Parliament.

The meaning of s. 114 of the Constitution was discussed at some length.[3] Isaacs J. held that duties of customs were imposed on the goods and therefore on property within the meaning of s. 114, but that they did not come within the meaning of the word tax as used in that section, and in the constitution generally.

[1] 5 C. L. R. 789, at p. 809. Cf. the discussion in *Parl. Pap.*, 1907–8, No. 128.

[2] For a good case of this, cf. the Privy Council judgement in *Dominion of Canada* v. *Province of Ontario*, [1910] A. C. 603.

[3] What constitutes importation was discussed in *Canada Sugar Refinery Co.* v. *The Queen*, [1898] A. C. 735, when it was held that mere taking of goods into the territorial waters of Canada to a port of call was not importation; arrival at a port of discharge at least was necessary. Quick and Garran, op. cit., p. 859.

The rest of the Court held that, whether capable or not of being included in the word tax, customs duties were not a tax upon property in the sense in which that expression is used in s. 114, being imposed upon the act of importation, not upon the goods themselves in their character as property.

So in the *Commonwealth* v. *New South Wales* [1] the question arose whether it was necessary to stamp a document transferring certain land to the Commonwealth under the *Property for Public Purposes Acquisition Act*, 1901, in view of the New South Wales Act, No. 27 of 1898. The Court held *inter alia* that even if the Act bound the Crown in New South Wales, which they held it did not, it could not bind the Crown in the Commonwealth, again emphasizing the separate personalities of the Crown in the several capacities in which it appears in the Commonwealth.

It was proposed in chap. v, s. 5, of the draft constitution [2] that all references or communications required by the constitution of the state to be made by the Governor of the state to the Queen should be made through the Governor-General, as Her Majesty's representative in the Commonwealth, and the Queen's pleasure should be made known through him, and it was argued by Sir S. Griffith,[3] that such an arrangement was essential if there was to be a real federation, but this view did not ultimately prevail. At Adelaide Mr. Deakin [4] moved for the retention of this rule, but it was opposed by Sir Edward Braddon and Mr. Kingston as an invasion of state rights, and the proposal was not carried.

The question of the relations between the Commonwealth and states with regard to external affairs was raised in an acute form in 1902 in connexion with the representations made to the Imperial Government as to the conduct of the Government of South Australia in refusing to arrest the crew of the Dutch vessel *Vondel* in accordance with the existing treaty between Holland and Great Britain

[1] 3 C. L. R. 807.

[2] Quick and Garran, pp. 931, 932; Harrison Moore, pp. 347–50.

[3] *Convention Debates*, 1891, p. 850. So Sir H. Parkes (p. 852) and Sir R. Baker (p. 852).

[4] *Adelaide Debates*, p. 1177.

regarding the arrest of deserters from merchant vessels. The Governor-General was requested by the Secretary of State for the Colonies to inquire into the matter and to report the result.[1] The Commonwealth Government asked the Government of South Australia for a report, but that Government replied that the constitutional means of obtaining information on the matter was through the Governor of South Australia, and that the Commonwealth Government had no jurisdiction as to the conduct of South Australian officials. The officer administering the Government of South Australia reported the position by telegraph on September 18, 1902,[2] to the Secretary of State, who at once asked the South Australian Government for the information desired with regard to the action of the officials in question, and for an expression of the opinion of the Government as to the channel of communication in matters affecting external affairs and the position of Consuls. On the other hand, the Government of the Commonwealth were of opinion that the case fell within the provisions of the constitution as affecting firstly external affairs; secondly, trade and commerce with foreign states; thirdly, navigation and shipping. They considered that the consular representative at Adelaide should have approached them and not the South Australian Government, and they suggested that consular representatives should be advised to come to the Governor-General direct in future through the Consul-General.[3] They also proposed to appoint a Royal Commission to inquire into the incident. The Secretary of State, however, deprecated the proposal of a Royal Commission, and suggested that the matter should be fully discussed before any action with regard to the Consuls was taken.[4] A full statement was accordingly received from the Acting-Governor of South Australia expressing the views of ministers on the subject.[5] The South Australian Government conceded that with regard to all matters connected with departments of Government

[1] See *Parl. Pap.*, Cd. 1587. There is an able criticism in Harrison Moore, op. cit., pp. 348 seq.

[2] Ibid., p. 1.

[3] Ibid., p. 2.

[4] Ibid.

[5] Ibid., pp. 7 seq.

actually transferred, or upon which the Commonwealth Parliament had power to make laws and had legislated, the Commonwealth Government was the proper channel of communication with the Imperial Government. In all other matters the proper channel of communication was the States Governor. They did not know whether the Commonwealth could legislate, under its power to make laws with respect to external affairs given by the constitution (s. 51 (xxix)), so as to enforce Imperial treaties and to punish state officers who violated such treaties, but no such law had yet been made, and if an officer were charged with contravening an Imperial obligation of this kind, the Commonwealth Government had no power even to call upon him for an explanation, much less to punish him if he had done wrong. It would be absurd to make the Commonwealth Government the channel of communication in matters in which they were powerless to act, and it would be an indignity to the South Australian Government, with whom at present lay the duty of maintaining within its borders Imperial treaties, if it were compelled to approach His Majesty's Government through the medium of any other Government. The fact that the High Court had original jurisdiction of 'matters arising under any treaty' or 'matters affecting the position of Consuls' did not transfer these questions to the executive control of the Commonwealth Government; the State Courts retained jurisdiction with regard to these cases. On the other hand, the Government of the Commonwealth[1] held that the matter to be investigated fell directly within the sphere of the Commonwealth's action. The fulfilment of treaty obligations was obviously one of those external affairs peculiarly federal which could not be dealt with independently by each state without producing an intolerable condition of confusion prolific in international complications. Trade and commerce with other countries and shipping were also specifically placed under Commonwealth control, and

[1] See Mr. Deakin's memorandum of September 26, 1902; ibid., pp. 10, 11. The views of South Australia were given by Mr. Jenkins and Mr. Gordon.

any inquiries made by the Consul of the Netherlands under the Convention of 1856 ought to have been addressed to the Federal Government.

The Secretary of State in a dispatch of November 25, 1902,[1] gave a reasoned opinion on the whole issue, of which the gist was that the Commonwealth, apart from technical legal considerations, was a new entity for purposes of external affairs, replacing the states in this respect, and that the question how an obligation of the Commonwealth was to be dealt with locally was not a matter which affected the principle that the obligation was one of the Commonwealth as such, and not of a state.

The following is the main portion of his dispatch :

My own views on the subject were indicated, as I have already pointed out in my telegram of the 1st of October last, by the fact that I addressed the Commonwealth upon the subject of the complaint of the Dutch Government in the first instance, and though I have examined the Memorandum of your ministers with the closest attention, I have not been able to find any sufficient reason to modify them.

It is due to your ministers that I should state in as full and frank a manner as that in which they themselves have expressed their views the reasons which have led me to a conclusion different from that which commends itself to them.

In the first place, it appears to me that the aim and object of the Commonwealth of Australia Constitution Act was not to create merely a new administrative and legislative machinery for the six states united in the Commonwealth, but to merge the six states into one united federal state or Commonwealth furnished with the powers essential to its existence as such. Before the Act came into force each of the separate states, subject, of course, to the ultimate authority of the Imperial Parliament, enjoyed practically all the powers and all the responsibilities of separate nations. By the Act a new state or nation was created armed with paramount power not only to settle the more important internal affairs relating to the common interests of the united peoples, but also to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any foreign Power.

[1] *Parl. Pap.*, Cd. 1587, pp. 12–5.

That appears to me the obvious meaning of s. 3 of the Act, which declares that on and after a day appointed by proclamation ' the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia '.

On that day Australia became one single entity, and no longer six separate states in the family of nations under the British Crown, and the external responsibility of Australia, except in regard to matters in respect to which a later date was fixed by the constitution, vested immediately in the Commonwealth, which was armed with the paramount power necessary to discharge it.

The consequence is, that in respect of all matters declared by the Constitution Act to be matters of federal concern, the immediate responsibility to His Majesty's Government rests upon the Federal Government. Whether the Federal Government and Parliament make special federal provision for the discharge of any part of that responsibility, or are content to leave it for the time to the state machinery already in existence, is entirely a matter of internal arrangement, and does not warrant His Majesty's Government in ignoring the fact that in the creation of the Commonwealth Parliament has, in compliance with the will of the people of Australia, devolved the responsibility upon the federal authority.

The sphere within which His Majesty's Government should communicate with the Federal Government is coextensive with the responsibility and power of the Commonwealth. There does not appear to be anything in the constitution which would justify them in limiting it, as contended by your ministers, to matters connected with departments actually transferred, or matters upon which the Commonwealth Parliament has power to make laws, and has made laws. Nor can I accept the view that in all matters not connected with departments transferred to the Commonwealth, or upon which the Commonwealth Parliament has not legislated, the relations which existed between the States and the Imperial Government before federation have been preserved by the constitution.

The powers of the states have, it is true, been preserved, but the immediate responsibility to His Majesty's Government for their exercise in federal matters has been transferred to the Commonwealth.

The constitution has furnished the Commonwealth with paramount power in regard to such matters, power wider in its scope than that vested in any individual state, and with corresponding responsibility ; the sphere of action possessed by the Commonwealth Executive extends over the whole area of that power and responsibility, and if the legislative or other machinery provided by the Commonwealth Parliament, or by the States Legislatures, for the discharge of that responsibility is inadequate or defective, it is their duty to see that a remedy is provided, either by inviting the State Governments and Legislatures to do so, or by federal action. The constitution has, in fact, placed the Commonwealth as an intermediary between the Imperial Government and the states in regard to the matters assigned to it, and if His Majesty's Government were to correspond direct with the states in regard to such matters, it would be tantamount to ignoring the obvious intention of the Act to fix the final responsibility for them on the Commonwealth.

Unless the Federal Government is made the channel of communication for all federal matters, it will obviously be impossible for it to judge whether the existing arrangements are suitable and sufficient, or whether any special provision is required for dealing with them.

The further argument that 'from the practical side of affairs the channel of communication with the Imperial Government must be one in which some power relative to the subject of communication actually flows, especially where the subject may require action for the protection of Imperial interests', appears to me to be based on the assumption that the power of the Commonwealth and its responsibilities are limited by the actual powers conferred for the time being on the Commonwealth Executive.

The illustration cited by your ministers in the third paragraph of their Memorandum shows, however, that they are aware that in a state of a federal or quasi-federal nature, like the British Empire, the responsibilities of the Executive are not bounded by the powers with which it is for the time being armed. It is the Imperial Government that is immediately and ultimately responsible to a foreign power if a state officer in Australia, a Dominion or provincial officer in Canada, or an officer in any self-governing Colony violates, or acts in contravention of an Imperial obligation. But in the grant of self-government to the Colonies, the power to call upon such an officer for explanation of his conduct or to punish him has been placed by Parliament in the hands of

the local executive. It has done so in implicit reliance on the co-operation and good will of the Colonial Executives, and in the confident faith that Imperial obligations are held as sacred by the people and the ministers of the Crown in the Dominions of His Majesty beyond the Seas as they are by the people and Government of this country.

That confidence has been amply justified by the steadfast loyalty of the Colonies and their ministers, and I have no doubt that in like manner in the case of Australia when the change made by the Commonwealth Constitution Act is fully understood the position of the federal authority as an intermediary will not in any way impair that loyalty or the cordiality with which any request for explanation or assistance has been met by the Governments of the several states now merged in the Commonwealth.

I do not gather that your ministers wish to contend that the question which arose in regard to the *Vondel* was not a 'federal' matter, but that it only contends that as it was one in regard to which the State Executive could, in present circumstances, alone take action, application should have been made direct to them. That contention I have dealt fully with above, and it does not appear to be necessary to enter into the question of the precise meaning to be attached to the words 'external affairs' in the Constitution Act; but I concur in the view of the Federal Government that the special provisions of Article 75 in respect to matters 'arising under any treaty', and matters 'affecting Consuls or other representatives of other countries', imply that such questions are of special federal concern.

I regret that your ministers should regard it as humiliating to them that communications on federal matters should pass through the Federal Government. That feeling does not appear to be shared by the other State Governments, and I am confident that when your Government have further considered the position, they will loyally accept what was undoubtedly the will of Parliament and of the people of Australia.

The Federal Government also argued at great length in minutes by the Attorney-General of November 12, 1902, and by the Prime Minister of November 21, 1902, in favour of the view that the proper mode of correspondence was through the Governor-General.[1] On the other hand, the

[1] *Parl. Pap.*, Cd. 1587, pp. 15–22.

Government of South Australia in a memorandum by the Acting-Premier of February 13, 1903,[1] maintained their position that the only mode of communication in such cases must be the State Government. The Secretary of State, in a dispatch of April 15, 1903,[2] declined to alter the opinion which he had already expressed. He pointed out that the difference between him and the State Government was in the view they took of the Constitution Act. In his opinion the Constitution Act created a new political community in Australia so far as other communities in the Empire or foreign nations were concerned.

The distribution of powers between the federal and state authorities is a matter of purely internal concern of which no external country or community can take any cognizance. It is to the Commonwealth and the Commonwealth alone that through the Imperial Government they must look for remedy or relief for any action affecting them done within the bounds of the Commonwealth, whether it is the act of a private individual, of a state official, or of a State Government. The Commonwealth is, through His Majesty's Government, just as responsible for any action of South Australia affecting an external community as the United States of America are for the action of Louisiana or any other state of the Union.

8. The Crown undoubtedly remains part of the constitution of the State of South Australia, and in matters affecting it in that capacity the proper channel of communication is between the Secretary of State and the State Governor. But in matters affecting the Crown in its capacity as the central authority of the Empire, the Secretary of State can, since the people of Australia have become one political community, look only to the Governor-General as the representative of the Crown in that community.

9. The view of your ministers would, if adopted, reduce the Commonwealth to the position of a federal league, not a federation, and appears to me to be entirely opposed not only to the spirit but to the letter of the Act.

10. The question of the channel of communication must be determined, not by inquiring whether the particular power which may have been exercised is one which the Australian Constitution Act declares to be a power left to

[1] *Parl. Pap.*, Cd. 1587, pp. 23–5. [2] Ibid., p. 25.

the states exclusively or a power in respect of which the Commonwealth has exclusive or paramount jurisdiction; it must be determined by the answer to the question whether the particular exercise of the power is a matter in which the Crown is concerned solely in its capacity as part of the constitution of the state, or in which the Crown is concerned as the central authority of the aggregate of communities composing the Empire.

The principles laid down in this dispatch were acted on in the Benjamin and Weigall cases.[1] The former case arose out of a claim suggested by the Queensland Government for compensation by the United States Government on behalf of Mr. G. J. Benjamin, in respect of ill-treatment at San Francisco, and the Secretary of State for the Colonies referred the matter back to the Commonwealth Government and not to the Government of Queensland. The Secretary of State then took the view that it was to the Commonwealth alone, through the Imperial Government, that external countries could look for remedy or relief. It was an essential part of the Federal Constitution that in his relations with communities outside Australia a citizen of the Commonwealth was to be regarded not as a Victorian or a Queenslander, but as an Australian. Weigall's case was that of an Australian ill-treated in Manchuria. His case was represented to the Imperial Government through the Government of New South Wales, and again the Secretary of State thought the Commonwealth must not be ignored.

Friction arose also over the regulations as to landing of sailors from foreign war vessels in state ports; the Commonwealth had, on the one hand, the control of defence, the state that of domestic police, but after discussion at the Brisbane Conference of 1907, an amicable solution was arrived at in 1910.[2] The states retain all their right of police power, and

[1] Cf. the discussion of these cases at the Premiers' Conference at Brisbane in 1907; Victoria *Parl. Pap.*, 1907, No. 23, pp. 37–47.

[2] Cf. Victoria *Parl. Pap.*, 1907, No. 23, pp. 271 seq.; Commonwealth *Statutory Rules*, No. 31 of 1909, modified in the direction of recognizing state authority by No. 29 of 1910, and again later see *Age*, October 17, 1910; *Rules*, No. 29 of 1911.

even in case of domestic disorder the federal power can, by s. 119 of the Constitution only intervene on the invitation of the executive authority, although it is bound to protect the states against invasion.[1]

The whole question came again to the front in connexion with the Colonial Conference of 1907. No invitations were sent to the Governments of the states to be represented at that Conference just as no invitations had been sent to them in 1902.[2] Realizing that this would be done, representations were made by the Governments of New South Wales, Victoria, Queensland, Tasmania, and Western Australia, in favour of the representation of the states at the Conference. The Secretary of State declined on the ground that no invitations had been sent in 1902, with the result that reasoned arguments in favour of the inclusion of the states in the Conference were presented by the Government of South Australia and by the Government of New South Wales, while the Government of the Commonwealth criticized in detail the arguments of New South Wales and of South Australia. It was urged by the Government of South Australia that it was not right that the Australian states should be omitted from the Imperial Conference. The Australian states were not in the position of Canadian provinces; they were still self-governing Colonies. Although certain specified powers were vested in the Commonwealth, and these powers might be extended by means of its legislative jurisdiction, by far the larger share of the work of carrying on the Government of Australia remained with the states, and the importance of the states was such that they felt it a slight to be excluded from the Conference to which

[1] Quick and Garran, pp. 964, 965; Harrison Moore, pp. 297, 348, 404, 498.

[2] See *Parl. Pap.*, Cd. 3337, 3340, 3524, pp. 92–4; and 5273, pp. 12–14. On the sending of invitations to the State Premiers via the Governor-General to attend the Coronation, which resulted in their not coming, see *Daily Chronicle*, January 25, 1902; Adelaide *Register*, January 18, 1902; *British Australasian*, February 20, 1902. In 1910 the invitations went direct via the Governors, and in several cases were accepted; Western Australia voted £1,500 for the expenses of the Premier's visit.

Newfoundland and Natal were to be admitted without question. They had no desire to disparage the Commonwealth Government or its dignity or importance. They were loyal to the principles of federation, but in substance the Commonwealth Government was practically an agency for the management, under the united control, of the customs and excise, postal, and defence departments of the six states. The admission of the agent to the Conference and the exclusion of the principals was as indefensible from a practical point of view as it was from the constitutional aspect. The Commonwealth Government had no power to represent the states in any matter over which they retained legislative and executive jurisdiction, as for example the administration of justice, police, municipal and local government, public health, education, poor relief, Crown lands, woods and forests, water conservation, irrigation, pastoral, agricultural, mineral and manufacturing interests, railway, rivers and harbours and lighthouses, and the aborigines. Moreover, even in the matters in which the Commonwealth had power, the questions for discussion—defence, customs, posts, and telegraphs—were of paramount interest to the economic working and efficiency of the State Governments. They instanced as examples in which the consultation of the states was essential, the proposed creation of an Imperial Council, an Imperial Court of Appeal, the discussion of immigration, and of preferential tariffs.[1] On the other hand, the Prime Minister of the Commonwealth criticized the arguments of South Australia in detail.[2] He insisted that the purpose of federation was to create a new unit entitled to act on behalf of Australia as a whole in all matters relating to the interests of Australia as a united community. The Imperial Conferences were primarily if not exclusively for the purpose of discussing external relations, and in these matters the states of Australia should no more be represented than the provinces of Canada. There might be matters on which the states should be consulted and conferences held, but they were not suitable matters for discussion at Imperial Conferences.

[1] See Cd. 3340, pp. 21 seq.

[2] Ibid., pp. 26 seq.

In a dispatch of February 16, 1907,[1] the Secretary of State communicated to the Governor of South Australia the decision of His Majesty's Government that it was not possible to admit the states to the Colonial Conference. His Majesty's Government did not wish to discuss the complicated question of the balance of Commonwealth and state powers; but they felt bound to point out that the establishment of the Commonwealth had so affected the constitutional position that there remained from that point of view no real analogy between the State of South Australia and the Colony of Natal. South Australia had already surrendered some of the most characteristic attributes and functions of self-government, and might at any moment surrender others. Defence, customs and excise, post and telegraphs, immigration, naturalization, over-sea trade and commerce, had all become subject to the paramount control of the Federal Parliament, while Natal could still exercise control over all these subjects. The Commonwealth in exercising its powers was not an agent of the states, it derived its authority direct from the same sources as the states—legally, from the Imperial Parliament; politically, from the will of the people. From the former point of view neither states nor Commonwealth were agents or delegates even of the Imperial Parliament; from the latter both alike represented the people of Australia but for different purposes. The matter at issue, therefore, resolved itself into the question whether the purposes of the Colonial Conference were included in the purposes for which the people of Australia had chosen to be represented by the Commonwealth. In point of fact the great majority of the subjects were matters which were now in effect the business of the Commonwealth alone, and therefore His Majesty's Government could not arrange for the separate representation of the states at the forthcoming Conference. Their decision implied no failure to appreciate the importance of the states or the necessity for inviting and fully considering the opinions of the States Governments within their own spheres, but no other decision could be

[1] See Cd. 3340, pp. 30 seq.

arrived at without disregarding the scheme of Commonwealth legislation or the fundamental principles on which the Colonial Conference was based. The decision of the Secretary of State was not accepted by the States Governments, but the question could not be further pressed in view of the decision of the Imperial Government; the Imperial Conference objected apparently to allowing their presence, and the States Premiers were not invited in 1910–1.

A good deal of misunderstanding, however, arose out of the constitution of a conference secretariat by Lord Elgin, as the result of the Conference of 1907; it was thought in Australia that some inroad on the powers of the states was contemplated, but a protest from New South Wales brought so emphatic a disclaimer from the Secretary of State that the matter dropped. The secretariat indeed was not concerned directly with the states at all, but with the Commonwealth and other Dominions represented in the Imperial Conference.

The question of the mode of communication has also been hotly contested with regard to the matter of honours,[1] the States Governments claiming that their recommendations should not be known to the Governor-General, and still less to the Commonwealth Government, while on the other hand, the Secretary of State has insisted on the position of the Governor-General as representing the whole of Australia. For the time being a compromise has been reached by it being arranged that the recommendations of the States Governments and the States Governors are submitted to the Governor-General for his personal information only. This question is only part of a larger discussion as to the communication of dispatches to and from States Governors to the Governor-General, a subject on which no final settlement has yet been reached.[2]

[1] Especially at the Sydney Conference of Premiers in 1906; see Harrison Moore, *Commonwealth of Australia*,[2] p. 350.

[2] State Governors send copies to the Governor-General of dispatches touching on federal interests, for his personal information and that of his ministers (Moore, *loc. cit.*), and copies are sent to him from the Colonial

To the claims of the states in this regard there has been some support in various judgements of the High Court, where the states are talked of as sovereign powers within their own ambits, and placed beside the Commonwealth also described as a sovereign power. This was notably the case in the whole series of judgements of the High Court in connexion with the establishment of the doctrine of non-interference with state instrumentalities by the Commonwealth or of federal instrumentalities by the state seen in the income-tax cases and the case of licensing duties.[1] But it may be noted also that in a subsequent case[2] the High Court admitted that all the states and the Commonwealth were not strictly full sovereign states as they were subject to the paramount authority of the Imperial Parliament, by which they are constituted, for every state and the Commonwealth owes its existence directly or indirectly to Imperial Acts. Still the High Court must be admitted to have decided that under the *Fugitive Offenders Act* the Governor of a state is still the proper person to act as required from the Governor of a Colony in that Act,[3] and O'Connor J. distinctly stated that in his view the Commonwealth had no power to legislate as to fugitive offenders at all, as the criminal law in the Commonwealth was in the hands of the State Parliaments, and not of the Commonwealth authorities. Moreover, this quasi-independent position of the states, even as regards external affairs, is recognized by the Colonial Office, in that, for example, official invitations are transmitted to the states to take part in conferences affecting their interests, and in that they are asked to accord recognition to consular officers. In both cases the Commonwealth Government are of course consulted, but the consultation of the state takes place as well,

Office of the dispatches to the states, for his personal information. The sending of circular dispatches via the Governor-General has not been adopted—the statement on the subject in Moore rests on a misunderstanding.

[1] *D'Emden* v. *Pedder*, 1 C. L. R. 91, at p. 109; *Baxter* v. *Commissioners of Taxation, New South Wales*, 4 C. L. R. 1087, at pp. 1121, 1126.

[2] See 5 C. L. R. 737, at 740. [3] *McKelvey* v. *Meagher*, 4 C. L. R. 265.

nor in any case yet has the state been overriden by the Commonwealth. Moreover, in matters of state concern, as will have been seen above, the states are invited to Imperial Conferences,[1] and the states have their Agents-General in England fully recognized by the Colonial Office.

This is not, however, to say that the view taken of the matter by the Imperial Government in the cases of the *Vondel* and the Imperial Conference is wrong. It would indeed be absurd to make any such claim ; the truth is that the federation is deliberately an incomplete one, and that its relations must be chaotic and incomplete unless and until it is desired by the Commonwealth and states to make them consistent and perfect.

The same position reappears in regard to the question of the position of State Governor. It has been laid down in the most convincing manner by the High Court of the Commonwealth that the Governor of a state, even while he is performing an act enjoined upon him by a Commonwealth statute, is none the less not liable to a *mandamus* by the Commonwealth High Court, and that as head of the state he is exempt from such a proceeding. That was decided in the case of *The King* v. *The Governor of the State of South Australia*[2] in 1907, when it was sought by Mr. Vardon, one of the candidates for election as Member of the Senate for that state, to establish his right to have an election held to fill up a vacancy caused by the order of the Court on a disputed election in 1906. He claimed that instead of the appointment being made by the two Houses sitting together, as the Governor had been advised to do by his Ministry, and as had been done, the appointment was one to be made by the ordinary electorate, a view afterwards confirmed by the High Court. But the High Court would not grant a *mandamus*, and declared that it could not take such action against a State Governor who was the political head of the state. In a subsequent case, *Horwitz* v. *Connor*,[3] it also refused

[1] e. g. the Surveyors' Conference of 1911 ; see *Parl. Pap.*, Cd. 5273, pp. 124 seq.

[2] 4 C. L. R. 1497.

[3] 6 C. L. R. 39.

to allow a *mandamus* to issue to a Governor in Council to consider a petition for release from a conviction on the grounds that no *mandamus* lay to the Governor in Council.

§ 3. The Executive Power of the Commonwealth

The executive power of the Commonwealth is very large and extends to the maintenance of the Constitution and the laws of the Commonwealth.[1] It includes in addition to the power conferred by Commonwealth Acts the power sole and exclusive over the transferred departments.

The departments transferred to the Commonwealth consist of the department of customs and excise, which under s. 69 of the Constitution were transferred from January 1, 1901, the day on which the Constitution commenced to work, and those of posts, telegraphs, and telephones, and naval and military defence, which were transferred to the Commonwealth on March 1, 1901. Lighthouses, lightships, beacons, and buoys were so intimately associated with navigation

[1] See Clark, *Australian Constitutional Law*, pp. 52-70. He emphasizes justly the fact that the whole executive power of the Crown in the Commonwealth is recognized, not created by the Act, and he insists that the Governor-General possesses under s. 61 all the executive power of the Commonwealth, and that s. 2 does not enable the Crown to limit that prerogative, but refers to the assignment of e. g. powers at international law not part of the executive power of the Commonwealth, and future powers as to the disposal of which the Crown may have an option. But the real main point is probably the grant of the pardon prerogative, which Mr. Justice Clark held to be included in the executive power, but in my opinion with doubtful accuracy: the international prerogatives could also be delegated specially and such minor 'prerogatives' as the right to grant the use of the royal arms; cf. Quick and Garran, *Constitution of Commonwealth*, p. 391; 14 V. L. R. 349, at p. 380 (per Higinbotham C.J.). That the King himself could not administer the Government is true, and in that respect the Federation differs from the Union of South Africa: the position of Canada is more doubtful, as the Governor-General's office is not expressly created by the Act, but I agree with Clement, *Canadian Constitution*, pp. 252, 253, that he could not do so. It may be added that it is sometimes suggested that the delegation of executive power to the Governors-General is more complete than that to the Governors e. g. of New Zealand or Newfoundland or the states (cf. Clark, p. 63; Quick and Garran, p. 390). This view is quite unfounded.

that no steps were taken to deal with them effectively until 1910, when in conjunction with the Navigation Bill a Bill to provide for the Commonwealth control was introduced, but held over until the Navigation Bill could be passed in 1911. In the case of quarantine the Commonwealth legislated in 1908 in a somewhat unusual manner, for the Act does not contemplate the total cesser of quarantine measures by the state authorities, but rather a scheme for co-operation, and the Act takes wider power than ever taken under the head of a quarantine Act for the stamping out of diseases of animals, plants, and persons, whenever introduced into or breaking out in the state or Commonwealth; it transpired while the Bill was passing through Parliament that the Act was in some of these regards *ultra vires*, but the matter is a doubtful one, and the advantage of Commonwealth control is obvious and will probably render the states indisposed to take steps against the Act. It is still open to the states to take action against plant diseases by excluding plants from other states, and Tasmania, Western and South Australia have done so.

§ 4. The Legislative Power of the Commonwealth and the States

The division of legislative power between the Commonwealth and the state is affected by ss. 106 and 107 of the Constitution, which continue the powers of the states save as altered in the Act, and by the following sections of the Act defining the legislative power of the Commonwealth. To these fall to be added the powers of the Parliament as to electoral matters, the franchise and so forth, the financial powers considered below, the power as to the judicature, and the powers as to the appointment of federal officers given by s. 67. It should be noted also that by s. 5 of the *Constitution Act*, the laws of the Commonwealth have an extra-territorial effect, being in force in all British ships, the King's ships of war excepted, whose first port of clearance and port of destination are in the Commonwealth.[1]

[1] Cf. *Commonwealth of Australia Constitution Bill*, pp. 142, 150; Com-

106. The constitution of each state of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be, until altered in accordance with the constitution of the state.

107. Every power of the Parliament of a Colony which has become or becomes a state, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the state, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be.

108. Every law in force in a Colony which has become or becomes a state, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the state; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the state shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a state.

109. When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

112. After uniform duties of customs have been imposed, a state may levy on imports or exports, or on goods passing into or out of the state, such charges as may be necessary for executing the inspection laws of the state; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113. All fermented, distilled, or other intoxicating liquids passing into any state or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the state as if such liquids had been produced in the state.

114. A state shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth

monwealth *Parliamentary Debates*, 1904, pp. 2069 seq., *ex parte Oesselman*, (1902) 2 S. R. (N.S.W.) 438; *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.*, 5 C. L. R. 737; Quick and Garran, *Constitution of Commonwealth*, pp. 361, 363; Harrison Moore, op. cit., pp. 281, 282; above, Part III, chap. ii.

impose any tax on property of any kind belonging to a state.

115. A state shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[1]

117. A subject of the Queen, resident in any state, shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other state.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every state.

119. The Commonwealth shall protect every state against invasion and, on the application of the Executive Government of the state, against domestic violence.

Part V.—Powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

(i) Trade and commerce with other countries, and among the states [including, under s. 98, navigation and shipping and state railways].

(ii) Taxation ; but so as not to discriminate between states or parts of states ;

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth ;

(iv) Borrowing money on the public credit of the Commonwealth ;

(v) Postal, telegraphic, telephonic, and other like services [2] ;

(vi) The naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth ;

(vii) Lighthouses, lightships, beacons, and buoys [3] ;

(viii) Astronomical and meteorological observations [4] ;

[1] The clause was due to Mr. Higgins's fear of sacerdotalism ; see Quick and Garran, op. cit., pp. 951–3 ; Harrison Moore, op. cit., pp. 287, 288.

[2] Cf. *Commonwealth* v. *Progress Advertising Co.*, 10 C. L. R. 457.

[3] On this head no legislation has yet been passed.

[4] See *Meteorology Act*, 1906.

(ix) Quarantine [1];
(x) Fisheries in Australian waters beyond territorial limits [2]; (a power exercised by the Federal Council of Australasia by Acts 51 Vict. No. 1 (Queensland), and 52 Vict. No. 1 (Western Australia).)
(xi) Census and statistics;
(xii) Currency, coinage, and legal tender;
(xiii) Banking, other than state banking; also state banking extending beyond the limits of the state concerned, the incorporation of banks, and the issue of paper money [2];
(xiv) Insurance, other than state insurance; also state insurance extending beyond the limits of the state concerned;
(xv) Weights and measures [2];
(xvi) Bills of exchange and promissory notes;
(xvii) Bankruptcy and insolvency [2];
(xviii) Copyrights, patents of inventions and designs, and trade marks;
(xix) Naturalization and aliens [3];
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth [2];
(xxi) Marriage [2];
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants [2];
(xxiii) Invalid and old-age pensions;
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states;
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states;
(xxvi) The people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws;
(xxvii) Immigration and emigration;
(xxviii) The influx of criminals;

[1] See *Quarantine Act*, 1908.

[2] On this head no legislation has been passed, but as to (xiii) cf. the *Bank Notes Tax Act*, 1910.

[3] This covers deportation of aliens like the Kanakas; see *Robtelmes* v. *Brenan*, (1906) 4 C. L. R. 395.

(xxix) External affairs [1];
(xxx) The relations of the Commonwealth with the islands of the Pacific;
(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws; [The law on the subject is laid down in the *Lands Acquisition Act*, 1906.]
(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
(xxxiii) The acquisition, with the consent of a state, of any railways of the state on terms arranged between the Commonwealth and the state; [This power, with the next, is exercised by Act No. 25 of 1910 regarding the transfer of the Northern Territory.]
(xxxiv) Railway construction and extension in any state with the consent of that state;
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state; [This power has been exercised in the *Conciliation and Arbitration Act* 1904, as amended in 1909 (No. 28) and 1910 (No. 7).]
(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any state or states, but so that the law shall extend only to states by whose Parliaments the matter is referred, or which afterwards adopt the law [2];
(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the states directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom, or by the Federal Council of Australasia [2];
(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

[1] See *Extradition Act*, 1903; *High Commissioner Act*, 1905–9. Harrison Moore, op. cit., p. 461, thinks treaties fall under this head; cf. also, *McKelvey* v. *Meagher*, 4 C. L. R. 265, at p. 278.

[2] On this head no legislation has yet been passed. xxxviii is not of course an authority to alter Imperial Acts; see Harrison Moore, p. 487; Quick and Garran, pp. 650, 651.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes ; [1]

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth; [viz. under s. 69, customs, excise, postal, defence, lighthouses, &c., and quarantine.]

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Of the powers given to the Commonwealth Parliament by s. 51 of the Act none are expressly stated to be exclusive of the powers of the states, but in some cases the nature of the power makes it necessarily exclusive as the power conferred is a power which, prior to the passing of the Act, did not exist, and could not be exercised by a State Parliament. This applies clearly to the powers given in subsections iv, vi (cf. s. 114), x, xii (cf. s. 115), xxiv, xxv, xxx, xxxi, xxxii, xxxiii, xxxiv, xxxv, xxxvi, xxxvii, xxxviii, and xxxix.[2]

Of the other matters entrusted to the Commonwealth a division may be made between those in which, once the Commonwealth has exercised its power, there will be practically no sphere left within which the state can exercise its authority, and those which more or less permanently permit an exercise of authority by the state concurrently with the exercise of authority by the Federal Parliament. Within the latter class fall clearly such powers as that of taxation (ii),[3] the state being able to raise whatever taxes it thinks necessary in addition to Commonwealth taxes, though in the case of land taxes the Commonwealth has by Acts Nos. 21 and 22

[1] The last branch of this section has been held to apply to a post office ; see *Rex* v. *Bamford*, (1901) 1 S. R. (N.S.W.) 337.

[2] Cf. Clark, *Australian Constitutional Law*, pp. 71–102, with whose views, however, I do not entirely agree ; Quick and Garran, op. cit., pp. 660 seq , 993–8 ; Harrison Moore, op. cit., pp. 273 seq., 445 seq.

[3] Cf. *Municipal Council of Sydney* v. *Commonwealth*, 1 C. L. R. 208, at p. 232, per Griffith C.J.

of 1910 placed the lower limit at £5,000 in order to give a sphere of action to the states, the question of astronomical and meteorological observations (viii), legislation as to census and statistics (xi), legislation as to foreign corporations, and trading or financial corporations, formed within the limits of the Commonwealth (xx), and invalid and old age pensions (xxiii);[1] while in some cases, namely those mentioned in subsections xxxiii, xxxiv, xxxvii, and xxxviii, legislation by the state is necessary to give effect to the Commonwealth legislation. On some of the other matters legislation by the Commonwealth must in effect supersede all state legislation, as for example, in the case of bills of exchange and promissory notes (xvi), copyright, patents, and trade marks (xviii),[2] and naturalization (xix); in each of these cases and in the case of currency (xii) the Commonwealth laws[3] have occupied the whole field, and State Acts could have no effect because their provisions would be overridden under s. 109 of the Constitution. As a matter of fact, the *Naturalization Act*, 1903 (s. 13), the *Patents Act*, 1903 (s. 8), the *Trade-Marks Act*, 1905 (s. 6), the *Copyright Act*, 1905 (s. 8), the *Bills of Exchange Act*, 1909 (s. 7), and the *Marine Insurance Act*, 1909 (s. 5), all contain clauses providing that the State Acts shall cease to apply—a phrase adopted in view of the rule laid down by the Privy Council in the case of Canada, that no repeal of a provincial law by the Dominion is possible. On other questions legislation may exist concurrently; for example, in the case of immigration and emigration (xxvii) and the influx of criminals (xxviii), Tasmania already, in 1909, has found it necessary to pass an Immigration Act which aims at preventing the entry

[1] But in fact the states will only in a few cases supplement the Commonwealth pensions, and as a whole the old-age pensions Acts have ceased to be operative.

[2] But, as will be seen below, a state alone can create a new species of industrial property not properly included under this caption according to the fair interpretation of the term.

[3] See *Bills of Exchange Act*, 1909; *Copyright Act*, 1905; *Patents Act*, 1903–9; *Trade-Marks Act*, 1905; *Designs Act*, 1906; *Coinage Act*, 1909; *Naturalization Act*, 1903; *Life Assurance Companies Act*, 1905; *Marine Insurance Act*, 1909.

into Tasmania of criminals of other states of the Commonwealth, and there are similar Acts of 1903 and 1905 in New South Wales and Queensland. Similarly the State Parliaments can make laws with regard to the people of any race, and these laws can exist concurrently with Commonwealth laws.

The exclusive powers of the Commonwealth under ss. 52 and 69 include all matters relating to the departments of posts, telegraphs, and telephones, naval and military defence, light-houses, light-ships, beacons and buoys, and quarantine, but though these departments cannot be regulated by the State Legislatures, it is perfectly open to the State Parliaments to legislate on all these subjects [1] pending the passing of Commonwealth Acts which contain provisions to which the provisions of the State Act are repugnant. It is clearly not the intention of the Commonwealth Act to deprive the State Parliaments of all legislative authority with regard to these subjects, but the State Parliaments were naturally forbidden forthwith to pass legislation affecting the constitution of the transferred departments or their duties. In point of fact, the matter of quarantine is still left, as regards internal regulation, in considerable measure to be regulated by the state executive action and legislation.[2] The Commonwealth has also exclusive powers over surrendered territory by s. 111, and over territory surrendered by the Crown under s. 122.

Moreover, there is no restriction on the legislation of the states as to external trade except such as is imposed by the fact that control of customs and excise and bounties has been taken away, save only in as far as the states are entitled to pass inspection laws.[3] The fact that trade and commerce

[1] S. 108. This cannot apply to the departments after transfer; see Harrison Moore, op. cit., p. 412; Quick and Garran, op. cit., p. 938.

[2] See Commonwealth *Official Year Book*, iv. 1120; cf. also Commonwealth *Parl. Pap.*, 1908, No. 194.

[3] Clark, op. cit., pp. 76 seq., thinks otherwise, and attributes to the police power (pp. 118–52) the power of the states to regulate trade other than domestic trade. I can find no warrant for this view. But Harrison Moore, op. cit., p. 331, suggests that in *The King* v. *Sutton* (5 C. L. R. 789) the High Court held explicitly that foreign commerce is exclusively the affair of the Commonwealth. This seems to go too far.

between the states and with foreign countries is assigned to the Commonwealth is not intended to restrict the state power to legislate save in as far as it is repugnant to Commonwealth legislation. Similarly, the states may not raise forces without the consent of the Parliament of the Commonwealth, and may not coin money or make anything but gold or silver coin legal tender, but subject to Commonwealth legislation the state has full power to legislate as to currency.

The position of naturalization before Union Acts were made by the Commonwealth is a subject of some interest. It is suggested by Mr. Justice Clark [1] that the result of s. 118 of the Constitution was to give in each of the states and throughout the Commonwealth naturalization to a person naturalized in any state under a state law, but it is hardly possible to accept this view. Fortunately the matter has been disposed of by the passing of the Commonwealth legislation of 1903.

As the Constitution is a federal one, the powers of the Parliament depend upon the interpretation of the exact wording of the Act. This is well illustrated by the cases respecting immigration, for the High Court have laid it down that the law of the Commonwealth can only affect immigrants, and not every person who arrives in Australia is an immigrant. It is not necessary to prove intention to remain for a definite period,[2] and there is no such thing as Australian nationality as opposed to British nationality.[3] But it was doubted in one case [4] whether the term ' immigration ' applied to the return of an Australian absent from Australia on a visit *animo revertendi*. Then later it was held that a person with a permanent home in Australia was not on his return from a visit an immigrant, and this was applied to a Chinese boy, an illegitimate son of a Victorian woman, who was removed at the age of five by his father to China, where

[1] Op. cit., pp. 96–102.

[2] *Chia Gee* v. *Martin*; *Chow Quin* v. *Martin*, 3 C. L. R. 649.

Attorney-General for the Commonwealth v. *Ah Sheung*, 4 C. L. R. 949. Contrast the distinction as to desertion in cases of Australian seamen drawn in the Navigation Bill of 1910 and defended by Senator Pearce.

[4] *Potter* v. *Minahan*, 7 C. L. R. 277.

he remained for twenty-six years, a decidedly strong case. On the other hand, the Court decided that mere formal domicile owing to the domicile of the father does not prevent an infant born out of Australia falling under the prohibition of the Act.[1]

In the case of many clauses the powers of the states have resulted in a definite restriction of the powers of the Commonwealth Parliament.[2]

§ 5. Relations of the Legislative Powers of the States and the Commonwealth according to Judgements of the High Court of Australia

(*a*) *The Immunity of Instrumentalities*[3]

In the case of *D'Emden* v. *Pedder*[4] the question was raised as to the effect of Act 2 Edw. VII. No. 30 of the State of Tasmania, which prescribed a stamp duty of 2*d.* in respect of every receipt where the sum received amounted to £5 and was under £50. The federal officers in Tasmania were called upon to give receipts in respect of their salaries, and D'Emden, who was Deputy Postmaster-General of the State of Tasmania, was summoned before the Court of Petty Sessions in Hobart on the ground that he gave a receipt for his salary which was not duly stamped in accordance with that law. He was convicted, and the case was taken on appeal to the Supreme Court, who held by a majority that the appellant was liable to pay the duty and confirmed the conviction, from which the defendant appealed to the High Court of the Commonwealth.

[1] *Ah Yin* v. *Christie*, 4 C. L. R. 1428. Cf. Natal Act, No. 3 of 1906.

[2] It is of interest to consider how far the Federal Parliament could use the State Parliaments as agencies for carrying out its powers: it can use the executive officers with their consent freely, and so does—but there is no authority yet in the shape of federal decisions; see *Parliamentary Debates*, 1907, pp. 3866 seq.; Harrison Moore, op. cit., pp. 442–4.

[3] See Harrison Moore, op. cit., pp. 421–37; *Law Quarterly Review*, xxiii. 373; Keith, *Journ. Soc. Comp. Leg.*, xii. 95 seq.

[4] 1 C. L. R. 91. Cf. also *Municipal Council of Sydney* v. *Commonwealth*, 1 C. L. R. 208; *Roberts* v. *Ahern*, 1 C. L. R. 406.

The High Court reversed the decision of the Supreme Court. The questions at issue were, in their opinion :—

1. Whether the Tasmanian Stamp Act should be construed as applying in terms to receipts given by Commonwealth officers for their salaries ; and

2. If so, whether such a law was within the competence of the State Legislature.

On the second head it was contended for the appellant that the Act, if so construed, operated as an interference by way of taxation with the federal agency ; that it attempted to impose a condition which must be complied with by an officer before he could receive the salary allotted to him by the Commonwealth ; that such a condition could not be constitutionally imposed by a state ; that the imposition of a stamp duty on the receipt for a federal salary was in effect taxation of the federal salary, which was not within the competence of the state ; that the receipt was the property of the Commonwealth, and therefore not taxable under the Constitution ; and further, that the Act so construed would be inconsistent with the Federal Appropriation Act, by which the officer's salary was fixed.

The Court pointed out with regard to the last contention that the Appropriation Act did not fix the salaries of public officers, but merely authorized the payment of lump sums specified in the schedules. With regard to the contention that the receipt was the property of the Commonwealth within the meaning of s. 114 of the Constitution, they held that it was not property of the kind intended in that section, which appeared rather to refer to taxation *qua* property.

With regard to the other ground of objection, the Court laid stress upon the fact that where any power or control was granted, there was included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control, the denial of which would render the grant itself ineffective. This they held was a statement of a necessary rule of construction of all grants of power, and applied from the necessity of the case to all to whom was committed the exercise of powers of

government. This also followed, in their opinion, from s. 61 of the Constitution, and it was part of the essence of the Constitution that within the ambit of its authority the Commonwealth should exercise its legislative and executive powers in absolute freedom, without any interference or control except that prescribed by the Constitution itself. In cases in which the states had similar power, s. 109 provided that the law of the Commonwealth should prevail; but in matters within the exclusive competence of the Federal Parliament no conflict could arise, inasmuch as from the point at which the quality of exclusiveness attached to the Federal power the competency of the state was altogether extinguished. If, then, a state attempted to give to its legislative or executive authority an operation which would fetter or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, was to that extent invalid and inoperative.

The Court cited in support of this view the case of *McCulloch* v. *State of Maryland*,[1] decided in 1819, in which Chief Justice Marshall laid down doctrines which have ever since been accepted as establishing on a firm basis the fundamental rules governing the relations of the Federation of the United States and the constituent states. While an attempt had been made by the Attorney-General for Tasmania to distinguish that case from the present case on the ground of ss. 107, 108, and 109 of the Commonwealth Constitution, they were unable to see any material difference between the provisions of those sections and the provisions of the tenth amendment of the United States Constitution. The Court was not, of course, bound by the decisions of the Supreme Court of the United States, but so far as the constitutions of the two federations were similar, the construction put upon the United States Constitution by the Supreme Court should be

[1] 4 Wheat. 316. For a criticism of this judgement cf. Mr. Higgins (now a justice) in *Harvard Law Review*, xviii. 559; *Commonwealth Law Review*, ii. 917. It had been invoked unsuccessfully in *Wollaston's* Case, (1902) 28 V. L. R. 357; see especially at pp. 387, 388, per Madden C.J.

considered as a most welcome aid and assistance in construing the Constitution of the Commonwealth.

Further, the Constitution of the Commonwealth had been adopted by a convention of representatives familiar with the Constitutions of the Dominion of Canada and of the United States, and if they found embodied in the Constitution provisions indistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long before been judicially interpreted by the Supreme Court of the Republic, it was not an unreasonable inference that the framers intended that like provisions should receive like interpretations.

The Court pointed out that the majority of the Supreme Court of Tasmania had been under a misapprehension in thinking that the doctrine laid down in *McCulloch's* case had been modified by later decisions. They also pointed out that the Courts of the Provinces of Ontario and New Brunswick since the year 1878 had adopted the doctrine laid down in *McCulloch's* case in the interpretation of the Constitution of the Dominion, and that their decisions, though uniformly adverse to the Provincial Governments, had not been made the subject of appeal, either to the Judicial Committee or to the Supreme Court of Canada.[1]

The Court also noted the suggestion that the doctrines enunciated in *McCulloch's* case were not applicable to the Commonwealth, by reason of the power of veto reserved to the Crown by the Constitution. It was, however, the duty of the Court and not of the Executive Government to determine the validity of an attempted exercise of legislative power, and it would be to impose an entirely novel duty upon the Crown's advisers if they were to be required, before advising whether the power of veto should be exercised,

[1] See *Leprohon* v. *City of Ottawa*, 2 O. A. R. 522; followed in *ex parte Owen*, 4 P. & B. 487; *Ackman* v. *Town of Moncton*, 24 N. B. 103; *Reg.* v. *Bowell*, (1896) 4 B. C. 498. Cf. *Evans* v. *Hudon*, (1877) 22 L. C. J. 268; and contrast *Fillmore* v. *Colburn*, 28 N. S. 292. This decision was, however, recognized by Lefroy, *Legislative Power in Canada*, p. 671, to be incorrect, and was in fact reversed by the Supreme Court in *Abbott* v. *City of St. John*, 40 S. C. R. 597, relying on *Webb* v. *Outtrim*, [1907] A. C. 81.

to consider the validity under the Constitution of the provisions of each Act presented for the royal assent.

The Court also noticed a misapprehension of the Supreme Court in thinking that, accepting the doctrine of *McCulloch* v. *Maryland* as sound law, it was a question in each case whether the attempted exercise of state authority actually impeded the operations of the Federal Government. They laid down that the question was solely not whether actual interference took place, but whether interference might take place.[1]

On these grounds they held that the Stamp Act did actually interfere with the action of a federal officer in the discharge of his duty to the Commonwealth. The Federal Audit Act required the giving of a receipt by the officer, and the Stamp Act penalized the performer of that duty unless a contribution were made to the state revenue. The attaching by a state law of any condition to the discharge of a federal duty was assuredly an act of interference or control. If, therefore, the Tasmanian Act were construed as applying to receipts given by a federal officer to the Federal Treasurer in the course of his federal duty, it would be an interference with him in the exercise of that duty and would, therefore, be invalid. It was, however, a sound principle that acts of a sovereign legislature, and indeed of subordinate legislatures, should be so interpreted as to make them operative and not inoperative, and the state law must therefore be interpreted so as not to apply to a receipt given by a federal officer.

The same principle of non-interference by state laws with the Commonwealth activities was reasserted in the income-tax case (*Deakin* v. *Webb* and *Lyne* v. *Webb*).[2] In this case it was decided that an income-tax of a state, so far as it attempted to tax the salaries of officers of the Commonwealth, fell within the principle of *D'Emden* v. *Pedder*;[3] that when a state attempted to give to its legislative or executive authority an operation which, if valid, would fetter, control,

[1] Contrast *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

[2] 1 C. L. R. 585.

[3] 1 C. L. R. 91.

or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, was to that extent invalid and inoperative. It was held that the salary of a minister of the Crown for the Commonwealth or of a member of the Commonwealth Parliament, so far as earned in Victoria, was not liable to assessment under the Income-Tax Acts of Victoria.

It was also held that the question raised was one as to the limits *inter se* of the constitutional powers of the Commonwealth and of a state within the meaning of s. 74 of the Constitution, and that the decision of the High Court as to the question was final and conclusive unless the High Court chose to give a certificate that the matter was one which ought to be determined by His Majesty in Council, and the High Court considered that this was not a case for such a certificate to be granted.[1]

In a subsequent case, *Commonwealth* v. *New South Wales*,[2] the Court decided *inter alia* that if a vendor transferred land to the Commonwealth for public purposes under the Act of 1901, he was performing a necessary instrumentality of the Commonwealth, and the transfer was not liable to be hampered by stamp duties under the New South Wales *Stamp Duties Act*.

In the case of *Webb* v. *Outtrim*,[3] which was brought to the Privy Council on appeal from the Supreme Court of Victoria, which followed the decision in *Deakin* v *Webb*,[4] the Privy Council rejected as applicable to the Commonwealth Constitution the principle of implied prohibition. In the judgement, which was delivered by Lord Halsbury, the Privy Council referred to the Constitution Act of 1855 as giving power to the Crown with Parliament to make laws in and

[1] The Supreme Court of Tasmania in *The King* v. *Bawden* (1 Tas. L. R. 156) applied the doctrine to a state abilities tax, which the Court held to be an income tax in substance, though calculated on the basis of multiples of the value of the residence.

[2] 3 C. L. R. 807.

[3] [1907] A. C. 81.

[4] 1 C. L. R. 585.

for Victoria in all cases, and to ss. 106 and 107 of the *Commonwealth of Australia Constitution Act*, which provided that the constitution of each state should continue until altered in accordance with the law of the Constitution in each case, and that the powers of the Parliament of each Colony should continue as at the establishment of the Commonwealth. The power of taxation by the Parliament was therefore apparently maintained, but it was argued that, inasmuch as the imposition of an income-tax might interfere with the free exercise of the legislative or executive power of the Commonwealth, such interference must be impliedly forbidden by the Constitution of the Commonwealth, although no such express prohibition could be found therein. Such a prohibition was based upon the judgement of Marshall C.J. in *McCulloch* v. *State of Maryland*,[1] and no doubt in dealing with the same subject-matter the judgement of that most learned and logical lawyer might be accepted as conclusive, but the Court was not bound by the decisions of the Supreme Court of the United States, though those decisions might be regarded as a most welcome aid and assistance in any analogous case. But in this case the analogy failed in the very matter which was under debate. No state of the Australian Commonwealth had the power of independent legislation possessed by the states of the American Union. Every Act of the Victorian Council and Assembly required the assent of the Crown, but when it was assented to it became an Act of Parliament as much as any Imperial Act, though the elements by which it was authorized were different. If indeed it were repugnant to the provisions of any Act of Parliament extending to the Colony it might be inoperative to the extent of its repugnance (see *The Colonial Laws Validity Act*, 1865), but with this exception [2] no authority existed by which its validity could be questioned or impeached. The American Union, on the other hand, had erected a tribunal which possessed jurisdiction to annul a statute upon the

[1] 4 Wheat. 316.

[2] This ignores the question of the territorial limitation of Colonial jurisdiction, but in the context no reference to that was necessary.

ground that it was unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' was used to describe a statute which, though within the legal power of the Legislature to enact, was contrary to the tone and spirit of our institutions, and to condemn the statesmanship which had advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question was the law and must be obeyed. It was obvious that there was no such analogy between the two systems of jurisprudence as the learned Chief Justice suggested. The enactments to which attention had been directed did not seem to leave any room for implied prohibition. *Expressum facit cessare tacitum.*

It was true that when a particular form of legislative enactment which had received authoritative interpretation was adopted in the framing of a later statute, it was a sound rule of construction to hold that the words so adopted were intended to bear the meaning so put upon them, but it was an extraordinary extension of such principles to argue that a similarity, not of words but of institutions, must necessarily carry with it as a consequence an identity in all respects. They referred to the remarks of Griffith C.J. in *D'Emden* v. *Pedder*,[1] in which he held that it was a reasonable inference that the provisions of the Constitution, which were undistinguishable in substance, though varied in form, from provisions of the United States Constitution which had long since been judicially interpreted by the Supreme Court of the United States, should receive a similar interpretation. They observed that the Chief Justice had not mentioned what provisions he referred to as 'undistinguishable in substance though varied in form'. They referred also to the remarks of the Chief Justice in *Deakin* v. *Webb*,[2] in which he said that the framers of the Australian Constitution had deliberately adopted, with regard to the distribution of powers, the model of the United States in preference to that of Canada. They pointed out that it was somewhat difficult to know what it was to which the learned Judge referred, and the only

[1] 1 C. L. R. 91, at p. 113.

[2] 1 C. L. R. 585, at p. 606.

explanation he gave was that 'they used language not verbally identical, but synonymous, for the purpose of defining that distribution'. It was, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution, and their supposed preferences for this or that model which might have been in their minds. Their Lordships were not able to acquiesce in any such principle of interpretation. The Legislature must have had in their minds the constitution of the several states with respect to which the Act of Parliament which their Lordships were called upon to interpret was passed. The 114th section of the Constitution Act sufficiently showed that protection from interference on the part of the federal power was not lost sight of. It was impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature. For these reasons their Lordships were not able to acquiesce in the reasoning of the High Court judgements governing the judgement under appeal. They would therefore humbly advise His Majesty that the judgement of the Supreme Court of Victoria ought to be reversed, that it ought to be declared that the salary in question was rightly included in the state assessment and was liable to income-tax, and that each party ought to pay his own costs of the special case and in the Supreme Court.

When the matter came back to the High Court in the case of *Baxter* v. *Commissioners of Taxation, New South Wales*,[1] the High Court had to decide whether it would follow the judgement given by the Privy Council overruling its decision in the preceding case, or whether it would re-assert that decision.

The High Court by a majority were of opinion that it was proper that they should re-examine their previous judgement in view of the fact that the Privy Council had disagreed with it, but they were unable to accept the ruling of the Privy Council. The majority (Griffith C.J., Barton and O'Connor JJ.)

[1] (1907) 4 C. L. R. 1087.

held that the High Court was, under the Constitution, the ultimate arbiter upon all such questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council. It was therefore not bound to follow the decision in *Webb* v. *Outtrim*,[1] but should follow its own considered decision in *Deakin* v. *Webb*,[2] in which it had refused to grant a certificate for an appeal to the Privy Council, unless upon a reconsideration of the question for whatever reason it should come to a different conclusion, and there was nothing in the reasons urged by the Judicial Committee to throw any new light on the question involved, either with regard to the necessity for the implication of the rule of implied prohibition laid down in *McCulloch* v. *Maryland*[3] and adopted in *D'Emden* v. *Pedder*,[4] or as to the applicability of the rule to the particular question. They examined in detail the arguments of the Privy Council, and asserted that the principle of necessary implication was one which must have been before the minds of the framers of the Commonwealth Constitution. The criticism which had been made by the Privy Council, that *Expressum facit cessare tacitum*, was not a sufficient doctrine on which to base an overruling of the view laid down by the High Court.[5] All the express prohibitions on which reliance was or could be placed, found their counterpart in the Constitution of the United States. The only section referred to expressly by the Privy Council which had any bearing on the application of the maxim was s. 114, which was not framed for the purpose of exhaustively defining the prohibitions upon the exercise of state powers, but with another intention. The rule of implied prohibition was an accepted part of the constitutional law of the United States, but it had been held by the United States Court that it did not extend to prohibit the taxation of federal property or state property in all cases. A distinction had been

[1] [1907] A. C. 81.
[2] 1 C. L. R. 585.
[3] 4 Wheat. 316.
[4] 1 C. L. R. 91.
[5] Cf. also the *State Railway Servants'* case, 4 C. L. R. 488, at pp. 519, 534.

drawn, and was still accepted in the United States, between property held as an instrumentality of Government, and property held by the Commonwealth or a state in the carrying on of an ordinary business or as an investment. In such cases the position of the United States would simply be that of an ordinary proprietor. The property in such cases, unless used as a means of carrying out the purpose of the Government, was subject to the legislative authority and control of the states equally with the property of private individuals. Since, then, it was intended that such a distinction should not be drawn in the case of the Commonwealth, it was, if not necessary, at least highly expedient to deal with the matter by express enactment. Moreover, the doctrine of necessary implication had been applied to the constitutions of British dependencies in the case of Crown Colonies. The High Court quoted the case of *In re Adam*[1] and the Queensland Constitutional Case,[2] and compared the case of *Attorney-General* v. *Cain and Gilhula*.[3] They added: The maxim *Expressum facit cessare tacitum* has been often evoked in vain in English Courts. See for example *Colquhoun* v. *Brooks*,[4] where Lopes L.J. called it 'A valuable servant, but a dangerous master'.

With regard to the criticism that there was a difference between the case of the Commonwealth and of the United States with regard to a law being unconstitutional, they pointed out that they had not asserted a power to declare a law invalid on the ground that it was unconstitutional, using that word in some vague general sense, and meaning something different from a contravention of the written Constitution. What they meant by the word unconstitutional was simply something contrary to and forbidden by the Constitution, and the word unconstitutional used in this connexion meant no more than *ultra vires*. They also noted the point of the controlling authority involved in the power of the sovereign to disallow any Act either of the Commonwealth or of any one of the states. They declined to regard

[1] 1 Moo. P. C. 460.
[2] 4 C. L. R. 1304.
[3] [1906] A. C. 572.
[4] 21 Q. B. D. 52.

this as being a sufficient ground for differentiating the case of the United States and the case of the Commonwealth, and in the course of the judgement the majority expressed themselves as follows :—

The analogy between the two systems of jurisprudence is therefore perfect. Indeed, it may be said that in this respect they are identical, unless, indeed, the attribute of sovereignty, using that term in any relevant sense, is denied to the Commonwealth. The King is the common head of the United Kingdom and of all the self-governing dominions, and the Legislature of each of these dominions has, subject to its own constitution, full autonomy. It seems strange that in this year 1907, when the world is resounding with praises [1] of the system of the British Empire, which allows its different members to enjoy this freedom and independence, we should be asked to decide solemnly that the idea is an entire delusion. It is now, we suppose, well recognized that, except so far as regards relations with foreign powers, which are not now in question, the King as the head of each of these several autonomous states is so far a separate juristic person that differences and conflicts may arise between these states just as between other autonomous states which do not owe allegiance to a common sovereign. It is too late to set up a contrary theory, unless it is intended to make a revolutionary change in the concept of the Empire.

Of the other two members of the Court—the Court now consisting of five instead of three justices—the view of Isaacs J.[2] was that the words of s. 74 were strong enough to lead to the conclusion that on questions falling within that section the decision of the High Court was final, and that therefore the Court had a right to decline to follow the decision of the Privy Council upon any such question. But the respect and weight due to a judgement of the Privy Council made it the duty of the High Court in the circumstances to reconsider the decision in *Deakin* v. *Webb*. Further consideration in the light of the decision in *Webb* v. *Outtrim* left the authority of *D'Emden* v. *Pedder* unimpaired,

[1] An allusion to the grant of self-government to the Transvaal and Orange River Colony.

[2] 4 C. L. R. 1087, at p. 1159.

but the Land and Income Tax Act of New South Wales, considered apart from authority and on the merits of the case, could not be regarded as an infringement of the rule of non-interference with Commonwealth instrumentalities laid down in the latter case.

Higgins J.[1] held that the only diminution of the prerogative right of the King in Council to entertain appeals from all Courts in the Colonies and Dependencies was that in cases involving such questions as were referred to in s. 74, when the High Court had given a decision there was to be no appeal from the High Court except by leave of the High Court, and there was nothing in the Constitution to make the High Court the final authority on any kind of law. The Act should not be extended by implication in the direction of infringement of the prerogative rights of the Crown. The King in Council being therefore still the appellate court from the High Court, and the High Court a court from which appeals could be brought to the King in Council, it was the duty of the High Court to accept the decision of the King in Council as the final statement of the law. The Land and Income Tax Act of New South Wales was not an interference with a Commonwealth instrumentality.

It is difficult to agree with the view taken by the majority of the High Court, either with regard to the question of the position of the High Court as opposed to the Privy Council, or as to the merits of the doctrine of implied prohibition. The High Court admitted in effect that, as regards the relations of the provinces of Canada and the Federal Government, the power of disallowance by the Governor-General is a matter of importance, and must be taken into consideration. The power of disallowance in the Commonwealth, though vested in the Crown and not in the Governor-General, cannot be ignored, and the existence of that power and, moreover, of the paramount power of the Imperial Parliament to legislate to adjust matters between the Commonwealth and the states, and it may be added the simple mode of altering the Constitution,

[1] 4 C. L. R. 1087, at p. 1161.

render the analogy of the United States Constitution a very slender one.[1]

Moreover, the natural interpretation of the *Commonwealth of Australia Constitution Act* is the one placed upon it by the Privy Council, and the interpretation of the United States Constitution is admittedly not a natural one, but one which has been rendered necessary in order to preserve the federation at all in view of the rigidity of the Constitution. The doctrine of necessary implication must therefore be regarded as still open to grave doubt as a permanent rendering of the Constitution of the Commonwealth, for it has been held by Isaacs J.[2] that the view laid down by the Privy Council, that the doctrine is not a part of the Commonwealth Constitution, is not merely sound in law, but is binding as a pronouncement on principle of a superior Court on the High Court of the Commonwealth, and Higgins J. holds the same view but in a stronger form, for he thinks that in all cases the High Court should follow the judgements of the Privy Council, whereas Isaacs J. holds that in cases coming within s. 74 of the Constitution the High Court is entitled to come to what decision it thinks fit without regard to a decision on the same matter of the Privy Council. Isaacs J. maintains, therefore, the doctrine that the states cannot interfere with a Commonwealth instrumentality, but in the form in which he upholds this view little exception need be taken to it, for he has declined to see in any ordinary legislation an interference with a Commonwealth instrumentality, and it may well be that even the Privy Council would decline to uphold the authority of legislation which aimed directly at interference with the Commonwealth. That is a very different principle from adopting an interpretation of the Constitution such as

[1] The constant doctrine of the sovereignty of the states is really an echo of the American doctrine; but there is the serious difference that the Colonies were never sovereign at all in any strict sense, while the states of the Union were once sovereign and the powers retained are remnants of that sovereignty. To use sovereignty to cover internal autonomy is hardly a convenient use of the phrase.

[2] *Huddart Parker & Co. Proprietary Ltd.* v. *Moorehead*, 8 C. L. R. 330, at pp. 387, 390.

that accepted by the High Court, which assumes that certain powers are impliedly reserved to the states, and which cuts down the powers conferred upon the Commonwealth Parliament in such a manner as to render them valid only when they do not infringe upon the powers believed to be reserved to the states.

The simpler doctrine is clearly that advocated by the two junior justices of the Court, that full effect should be given to the Commonwealth powers of legislation in every respect, and that they should not be restricted by the supposed limitations placed upon them by the implied reservations of state powers.

Conversely, the Privy Council has held that the powers of the states should not be rendered nugatory by supposed limitations on their powers in the interests of the Commonwealth.

The decision of the Privy Council is clearly one based on the ordinary interpretation of an Imperial Act, and as a matter of law it cannot be regarded but as being superior to the view taken by the High Court, for that a Constitution granted by the Imperial Parliament should be interpreted by the principles of the rigid Constitution of the United States is a result which legally is certainly unsound. On the other hand, it is but right to say that the members of the High Court were so prominently engaged in the framing of the Constitution which they now interpret, that it may well be that their opinions as to the meaning of that Constitution express its intention more accurately than the judgements of the Privy Council. But that is only to say that their interpretation may be more closely allied to the spirit of the Constitution, at least as they understand it; it is not to say that it is a more accurate reproduction of the legal effect of the Constitution, as it in fact exists established by an Act of the Imperial Parliament, to which the ordinary principles of the interpretation of Acts of that Parliament should in the absence of adequate reason to the contrary most certainly be applied.

On the other hand, it is clear that the High Court is not

prepared to carry the doctrine of the immunity of instrumentalities beyond reasonable limits. This was clearly shown in the case of *The King* v. *Sutton*,[1] which arose out of the forcible removal, under orders of the New South Wales Government, of a quantity of wire netting from the control of the Customs without payment of duty, on the ground that the Commonwealth could not tax the Crown in New South Wales. The doctrine of the immunity of instrumentalities was not indeed pressed in that case upon the Court, for there could be no doubt that the importation of wire netting to be sold to farmers could only by a stretch of language be deemed the operation of a state instrumentality. But the Court was invited to accept the doctrine that the Crown could not be bound except by express words, and no such words appeared in the Act. The Court unanimously rejected this plea, and, while admitting the sovereign powers of the states in their own spheres of activity, insisted on the fact that the Crown in the Commonwealth was distinct from the Crown in the states, and that the rule that a statute does not bind the Crown save by express words or necessary implication applied only to those representatives of the Crown who had executive authority in the place where the statute applied, and as to matters to which that executive authority extended. The *Customs Act*, 1901, bound the states, but not the Commonwealth, and the removal of the wire netting was a wrongful act.

In a second case of the same date, *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales*,[2] the question of instrumentalities came definitely before the Court. In that case the goods in question which the State of New South Wales claimed to be entitled to import free were steel rails, for use in connexion with the Government railways of the state, and the position of the state appeared naturally to be greatly strengthened by the decision in the *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association*[3]

[1] (1908) 5 C. L. R. 789.
[2] (1908) 5 C. L. R. 818.
[3] (1906) 4 C. L. R. 488.

that the Commonwealth *Conciliation and Arbitration Act*, 1904, could not apply to a state railway. The Court rejected this view on the ground that the rule of interpretation adopted in that case, and laid down in *D'Emden* v. *Pedder*,[1] could not apply where a power conferred on the Commonwealth in express terms was of such a nature that its effective exercise manifestly involved the control of some operation of a State Government, and they instanced, as possible cases of such legislation, legislation based on the powers given by s. 51 of the Constitution to legislate as to quarantine (ix), weights and measures (xv), immigration (xxvii), or trade and commerce with other countries and among the states (i). Moreover, the rule had no application to the question whether any specific thing might be brought within the state so as to become such a means or instrumentality. Further, it was pointed out that the doctrine, if applied in such a case, would utterly defeat the whole purpose of the creation of the Commonwealth, for the state could render null the Customs Act by importing all the goods required for use by any persons in the state as state property. Similarly quarantine and immigration laws could be set at naught and the whole operation of the Commonwealth prevented.

(*b*) *The Reserved Powers of the States*

The counterpart to the doctrine of the immunity of instrumentalities is the doctrine of reserved powers ; that is, powers which are reserved to the State Legislatures by the spirit of the Constitution, and which Commonwealth laws must not transgress, save in so far as such disregard is authorized by the express words or necessary intention of the Constitution itself. The doctrine appeared almost simultaneously with that of the immunity of instrumentalities.

In the *State Railway Servants' Case*[2] the latter doctrine was applied to the state railways, but the Court also laid it down that subsections xxxii–xxxiv of s. 51 imported that in regard to such railways, save as regards transport for military

[1] (1904) 1 C. L. R. 91.

[2] 4 C. L. R. 488 ; see Harrison Moore, op. cit., pp. 578 seq.

and naval purposes, the action of the Commonwealth was definitely restricted by the grant of the definite powers in these subsections. Thus the commerce power (i), or the postal power, could not authorize the building or acquisition of state railways without the consent of the state and their control as to running of trains, &c. The matter is complicated by the provisions of ss. 92, 98, and 102–4, and it is clear that the adoption of the referenda of 1911 would have simplified matters.

In the case of *Peterswald* v. *Bartley*[1] the question was raised whether brewers' licence fees under s. 71 of the New South Wales *Liquor Act*, No. 18 of 1898, were duties of excise within the meaning of ss. 86–90 of the Commonwealth Constitution, and therefore not within the power of the State Parliament to impose. It was, however, held that the imposition of such licence fees was a *bona fide* exercise of the police power of the state for the control and regulation of the trade. It has been held below, in the Supreme Court of New South Wales,[2] that the licence fee was an excise duty, but the Commonwealth Court laid stress on the fact that the Constitution did not provide for the Commonwealth Parliament interfering with the private or internal affairs of the states, or restricting the power of the state to regulate the carrying on of any business or trade within its boundaries. Such a construction of the Constitution as gave to the Commonwealth the power to regulate the internal affairs of the states in connexion with nearly all trades and businesses carried on in the states was altogether contrary to the spirit of the Constitution, and would not be accepted by the Court unless the plain words of the statute required. Conversely, in *The King* v. *Barger*[3] the excise there levied by the Commonwealth was held to be a regulation of internal trade, and not a real tax at all.

The doctrine of implied prohibition appeared in its strongest form in that case which arose out of the 'new pro-

[1] 1 C. L. R. 497.

[2] 4 S. R. (N. S. W.) 290.

[3] 6 C. L. R. 41; Commonwealth *Parl. Pap.*, 1907–8, Nos. 134, 147; 1908, No. 16.

tection' policy of the Commonwealth Parliament. This policy was intended as a counterpart to the levying of a high tariff, and to secure to the workers their share in the advantages which accrued to the manufacturers by the enactment of a high tariff. Accordingly, by the *Excise Tariff*, 1906 (Act No. 16 of 1906), an excise duty was placed *inter alia* on implements manufactured in Australia, but an exemption was given if the conditions as to remuneration of labour specified in the Act were complied with. Under the Act penalties were claimed against *Barger* and *McKay*, manufacturers of agricultural implements, who declined to comply with the conditions specified or to pay the excise duties. The State of Victoria was permitted to intervene in support of the objection to the Act. The Court, as usual, were divided in opinion: the majority, composed of Griffith C.J., Barton and O'Connor JJ., were against the validity of the Act, the other two judges in favour of it.

The judgement of the Court recognized that the language of an Act was not decisive as to its character, which was determined by the substance of the legislation. They held also that taxation was essentially different in a federal state from the power to regulate indirectly the domestic affairs of the states, a power denied to the Commonwealth Parliament, and that the power to tax must not be used so as directly to interfere with the control of the domestic concerns of any state. To select a method of taxation which made the liability to taxation dependent on conditions to be observed in the industry in which they were produced was as much an attempt to regulate the conditions as if the regulation were made by distinct enactment. The *Excise Tariff*, 1906, was not really an Excise Act, but an Act to regulate the conditions of manufacture of agricultural implements, and was not an exercise of the power of taxation of the Commonwealth. The Act was also open to the objection that it dealt with the regulation of the conditions of manufacture as well as excise, and so contravened the express provision of s. 55 of the Constitution, which confines an Excise Act to matters of excise, and, moreover, even if every other objection could

be overcome, the Act would be invalid, as it authorized discrimination between states, and so violated s. 97 of the Constitution, which forbids any preference of one state over another.

The two dissenting judges, on the other hand, maintained that the true mode of viewing the question was not to assert the doctrine of implied prohibition, but to construe the powers granted to the Commonwealth in as full a manner as if the Commonwealth Parliament were that of a unitary state. The powers of the states were the residual power remaining after the powers of the Commonwealth had been ascertained, and the possibility of the misuse of a legislative power was no argument against its existence ; the remedy lay with the electorate, not with the Courts. The objections aimed at the Act were based on alleged abuse of power, consequences, and motive, all of which the Court was incompetent to entertain. The demand of a contribution to the consolidated revenue was taxation, and the *Excise Tariff*, construed as it stood and not transformed, was well within the powers of the Commonwealth. The Act did not attempt to render unlawful any conditions of manufacture : it was not an Act which a State Parliament could pass, but an exercise of the power of excise taxation, and it did not contravene s. 55 of the Constitution, for it merely imposed excise taxation. Nor did it discriminate between states as such, and so did not contravene the provisions of the Constitution forbidding such discrimination.

The same principles, the determination to respect the sphere of action of the state and the wish to interpret strictly the powers granted to the Commonwealth Parliament by the Constitution, were illustrated by the case of the *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales*.[1] In that case the validity of part vii of the Commonwealth *Trade-Marks Act*, 1905, came up for consideration. That section of the Act provided for the registration of workers' trade-marks. These marks or labels were marks affixed to goods to show that they were manu-

[1] (1908) 6 C. L. R. 469 ; Harrison Moore, op. cit., pp. 371 seq.

factured by the workers or associations of workers by whom they were registered, and the Act penalized the use of marks in the case of goods not produced by the workers or associations. The aim of the enactment was, of course, to extend the influence of trade unions by allowing the immediate identification of goods as produced under union conditions, and several brewery companies of New South Wales questioned the validity of part vii. There were several minor points at issue, (1) whether the companies were substantially injured by the mere existence of the law, (2) whether the Attorney-General for New South Wales had a right to intervene on behalf of the public of the state, and (3) whether an injunction was the proper remedy; but all these points were settled in favour of the plaintiff, though Isaacs and Higgins JJ. dissented on heads (1) and (3), and Higgins also on head (2).[1] The decision of the Court was against the validity of the part of the Act attacked. They held (Griffith C.J., Barton and O'Connor JJ.) that the power of the Commonwealth to legislate as to trade-marks did not extend to permit the creation of what was not a trade-mark at all in the sense of that word as understood in 1900, the date of the enactment of the Constitution. As O'Connor J.[2] pointed out, a workers' trade-mark was deficient in both of the essential characteristics of a trade-mark as ordinarily understood, a trade or business connexion between the proprietor of the trade-mark and the goods in question, and distinctiveness in the sense of being used to distinguish the particular goods to which it is applied from other goods of a like character belonging to other people. As this part of the Act did not fall within the powers of the Parliament to legislate as to trade-marks, it could only be supported if it fell under some other head of the powers of the Commonwealth. But though its provisions might be in part justified under the power given by s. 51 (i) of the Constitution to legislate regarding trade and commerce with other countries and between the states, nevertheless the substantive aim of the part of the Act concerned was to regulate the internal trade of a state, and

[1] Cf. Harrison Moore, pp. 395-7.

[2] 6 C. L. R. 469, at p. 540.

that was explicitly prohibited by the express grant of power to legislate for trade with other countries and among the states. 'In my opinion,' said Griffith C.J.,[1] 'it should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject-matter to the states to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible.'

On the other hand, Isaacs J.[2] and Higgins J.[3] were equally clear that the power to legislate as to trade-marks covered the actual legislation which had been passed. The former, by an elaborate examination of the true meaning of trade-mark, arrived at the conclusion that it merely imported a mark used in trade and connected in some way with goods in order to identify the goods with persons. The Commonwealth Parliament was therefore fully entitled to confer the right of having workers' trade-marks on such persons as it thought fit, and its legislation in that regard would override any state legislation to the contrary. 'I confess,' he said, 'I do not understand the doctrine which acknowledges the plenary character of powers, and at the same time restricts them. Denying complete supremacy with regard to a power affirmatively granted is a doctrine which seems to me incompatible with s. v of the *Commonwealth of Australia Constitution Act*, and one which leads not merely to constant conflict, but also to inevitable uncertainty as to the respective spheres of national and state action and authority.' Higgins J. held that the workers' trade-mark contained all the essential characteristics of a trade-mark as understood at the time of the passing of the Constitution, although not all the essential characteristics of a trade-mark then enforceable in British Courts. The term must be understood in its full grammatical and ordinary sense in 1900, and he argued further that even if the workers' trade-mark went beyond

[1] 6 C. L. R. 469, at p. 503.
[2] 6 C. L. R. 469, at pp. 559 seq.
[3] 6 C. L. R. 469, at pp. 599 seq.

the sense usual in 1900, the Constitution gave the Parliament power to say what marks should be recognized as trade-marks and what not, and the meaning of the expression in 1900 gave the centre, not the circumference, of the power. He countered the obvious argument that the power of definition might be used to arrogate a power not conferred by the Constitution by quoting the case of *Attorney-General for Quebec* v. *Queen Insurance Co.*,[1] in which the Privy Council rejected the attempt of a provincial legislature in Canada to enact a stamp tax (which under the *British North America Act*, 1867, it has no power to do) by imposing what was really such a tax in the form of a business licence.

(c) *Control of Companies*[2]

The question of the power of the Commonwealth Parliament with regard to the control of companies was exhaustively considered in the case of *Huddart Parker and Company Proprietary Limited* v. *Moorehead*,[3] which was decided by the High Court in 1908, and in the decision of which they applied their usual principle of asserting that Commonwealth legislation must not interfere with the reserved power of the states to deal with internal trade and commerce.

There were two points at issue in the case. The first was as to the validity of s. 15 B of the *Australian Industries Preservation Act*, 1906, as amended by Act No. 5 of 1908; the second was the question of the validity of ss. 5 and 8 of the former Act. S. 15 B gave to the Controller-General of Customs the power to ask certain questions if he believed that an offence had been committed against part ii of the Act. It was held by the whole Court that the inquiry thus authorized was in no way inconsistent with the right to trial by jury conferred by s. 80 of the Constitution; that such an inquiry was not an exercise of the judicial power of the Commonwealth, and that such an inquiry was not an incident of the execution and maintenance of the provisions of the Constitution

[1] 3 App. Cas. 1090.

[2] Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 578, 579 (as to banks), 604–8; Keith, *Journ. Soc. Comp. Leg.*, xii. 108 seq.

[3] 8 C. L. R. 330. See Harrison Moore, op. cit., pp. 469–73.

relating to trade and commerce within the meaning of s. 101 of the Constitution, and need not therefore be entrusted to the inter-state commission.

But on the main point at issue the Court was divided. S. 5 of the Act penalized any foreign corporation or trading or financial corporation formed within the Commonwealth which made any contract or engaged in any combination, either to restrain trade or commerce within the Commonwealth to the detriment of the public, or to destroy or injure by means of unfair competition any Australian industry, the preservation of which was advantageous to the Commonwealth. S. 8 penalized any similar corporation which monopolized or attempted to monopolize, or conspired or combined to monopolize any part of the trade or commerce within the Commonwealth with intention to control to the detriment of the public the supply or price of any service, merchandise, or commodity.

The question which thus arose was whether these provisions were within the power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. The whole of the Court held that the section did not confer on the Commonwealth Parliament power to create corporations, but the power was limited to legislation as to foreign corporations and corporations created by state law. But they were divided as to what extent of legislation was permitted. The view of Griffith C.J.[1] and Barton J.[2] was that the section in question of the Constitution conferred upon the Commonwealth Parliament power to prohibit foreign corporations and trading and financial corporations formed under state laws from engaging in trade and commerce within a state, as distinguished from trade and commerce between states or with foreign countries, or to impose conditions subject to which they may engage in such trade and commerce, but did not confer upon the Commonwealth Parliament power to control the operations of such corporations which lawfully engage in such trade and commerce.

[1] (1907) 8 C. L. R. 330, at pp. 345 seq. [2] Ibid., at pp. 360 seq.

O'Connor J.[1] thought that the power conferred by s. 51 (xx) of the Constitution was limited to the making of laws with respect to the recognition of corporations as legal entities within the Commonwealth, and did not include a power to make laws for regulating and controlling the business of corporations when once they had been so recognized, and were exercising their corporate functions by carrying on business in the Commonwealth.

Higgins J.[2] held that the power conferred by s. 51 (xx) of the Constitution on the Commonwealth Parliament was a power to legislate with respect to the classes of corporations named, as corporations—that is, to regulate the status and capacity of such corporations and the conditions on which they might be permitted to carry on business; but did not include a power to regulate the contracts into which corporations might enter within the scope of their permitted powers. Ss. 5 and 8 of the *Australian Industries Preservation Act*, 1906, were not legislation with respect to such corporations, but legislation with respect to trade and commerce.

On the other hand, Isaacs J.[3] held that the Commonwealth Parliament had power, not to regulate the powers and capacities of corporations, but to control the conduct of corporations in relation to outside persons, and he urged strongly that ss. 5 and 8 of the Act were a valid exercise of such power. He was also decidedly of opinion that this must be the sense of the power given in the Commonwealth Act, which would otherwise be of little value or importance.

The result of the case was the introduction by the Attorney-General on September 29, 1910, and the passing by the Parliament for submission to a referendum in April 1911 of a Bill to alter the Constitution as follows :—[4]

3. S. 51 of the Constitution is altered by omitting the words 'Foreign corporations, and trading or financial cor-

[1] 8 C. L. R. 330, at pp. 367 seq.

[2] Ibid., at pp. 408 seq.

[3] 8 C. L. R. 330, at pp. 381 seq.

[4] See *Parliamentary Debates*, 1910, *passim*. The debates of both Houses were separately issued as a pamphlet. For the terms of the proposed law, see *Gazette*, March 16, 1911.

porations formed within the limits of the Commonwealth ', and inserting in lieu thereof the words—

' Corporations, including—

(*a*) the creation, dissolution, regulation, and control of corporations ;

(*b*) corporations formed under the law of a state (except any corporation formed solely for religious, charitable, scientific, or artistic purposes, and not for the acquisition of gain by the corporation or its members), including their dissolution, regulation, and control ; and

(*c*) foreign corporations, including their regulation and control.'

5. S. 51 of the Constitution is altered by adding at the end thereof the following paragraph :—

' (xl) Combinations and monopolies in relation to the production, manufacture, or supply of goods or services.'

Moreover, in a further Bill introduced on October 5, 1910, entitled ' Constitution Alteration (Monopolies), 1910 ', the Constitution was to be altered by inserting after s. 51 thereof the following section :—

51 A. When each House of the Parliament, in the same session, has by Resolution declared that the industry or business of producing, manufacturing, or supplying any specified goods, or of supplying any specified services, is the subject of a monopoly, the Parliament shall have power to make laws for carrying on the industry or business by or under the control of the Commonwealth, and acquiring for that purpose any property used in connexion with the industry or business.

(*d*) *Arbitration Law.*

It has been found necessary also because of the narrow view of the legislative power of the Commonwealth taken by the High Court to seek to amend the powers given to the Court of Conciliation and Arbitration. The matter came to a head in the woodworkers' case, viz. *The Federated Saw Mill, Timber Yard, and General Woodworkers Employés' Association* v. *James Moore & Sons Proprietary, Limited.*[1] Many

[1] (1909) 8 C. L. R. 465. For the discussion on the Bill for the Act of 1904, see *Parliamentary Debates*, 1903, pp. 3183 seq., 4140 seq., 4736 seq. ; 1904, pp. 2259 seq., 2347 seq., 2478 seq. ; Harrison Moore, op. cit., pp. 451 seq. The Act was very defective, and was extensively amended in 1910 by Act No. 7. Cf. Keith, op. cit., pp. 110 seq.

important questions as regards the power of the Court were decided in that case, which are summed up in the headnote to the case as follows :—

Assuming the existence of all other circumstances which constitute an industrial dispute extending beyond the limits of one state, including a demand by combined and organized employés on their employers, want of preconcert on the part of the employers in refusing the demand does not either under s. 51 (xxxv) of the constitution or under the Commonwealth *Conciliation and Arbitration Act*, 1904, deprive the Commonwealth Court of Conciliation and Arbitration of jurisdiction to make an award on a plaint brought before the Court by the organization of employés.

So held by O'Connor, Isaacs, and Higgins JJ.

By Griffith C.J. :—

The absence of such preconcert may be evidence to negative the existence of a dispute within the meaning of s. 51 (xxxv) of the constitution, but, on the assumption mentioned, the mere want of such preconcert on the part of the employers does not, under the Commonwealth *Conciliation and Arbitration Act*, 1904, deprive the Commonwealth Court of such jurisdiction.

Where part of the demand made by an organization of employés is that the wages in one state shall be higher than those in the other states, the Commonwealth Court of Conciliation and Arbitration may, nevertheless, make an enforceable award in respect of the employés in that state.

If an industry has several different and well-recognized branches, the Commonwealth Court of Conciliation and Arbitration may make an award enforceable in all the states to which the particular dispute extends, as to wages and conditions of labour in that industry, notwithstanding that, at the time the dispute is brought before the Court,

(1) In one or more states no member of the organization of employés which is bringing the plaint is actually employed in one of the branches of the industry, or

(2) In one of the states one of the branches of the industry is not carried on, or

(3) One of the employers, who carries on all the branches in one state and only one branch in another state, is not in the former state employing any members of the organization in one of the branches, or

(4) An employer carrying on all the branches in one state

is not in one branch employing any members of the organization.

But the vital question which was at issue was whether the Commonwealth Court of Conciliation and Arbitration had power to make an enforceable award inconsistent with (1) the award of a state Arbitration Court, (2) an industrial agreement made and registered pursuant to a state statute, (3) an industrial agreement enforceable under state law, or (4) a determination of a wages board empowered by state statute to fix a minimum rate of wages.

It was held by the whole Court (Barton J. was absent) that the award need not be consistent with either of the first three categories, but the Chief Justice and O'Connor J. held that it had no power to make an award inconsistent with the determination of the Wages Board. It is very difficult to follow the decision of the two senior judges in this case, for the other three matters in which they held that the Court could override a state determination did not differ much in principle from the determination of a wages board; indeed, why an order of an Arbitration Court in a state should be inferior in validity to a wages board it would be very difficult, if not impossible, to determine.

In the case of the *Australian Boot Trade Employés' Federation* v. *Whybrow & Company*,[1] the powers of the Conciliation and Arbitration Court of the Commonwealth were fully investigated. In that case a dispute had arisen between the Federation and the Company and others who were employers in the boot trade in New South Wales, Victoria, Queensland, and South Australia, and the claimants brought a plaint in the Commonwealth Court. The President stated a special case for the determination of the High Court, which included the question whether it was competent for the Commonwealth Court to make an award inconsistent with an award or determination of the States Wages Boards. This question was necessary because an award had been made in New South Wales under the *Industrial Disputes Act* of 1908, an award had been made in Victoria under the *Fac-*

[1] 10 C. L. R. 266.

tories and Shops Act, 1905, an award in Queensland under the *Wages Board Act*, 1908, and the *Factories and Shops Act*, 1909, and an award in South Australia under the *Factories Act*, 1907.

It was proposed by the Court to fix the minimum rate of wages at a higher rate than any of the minimum rates fixed by the States Wages Boards, and to make different provisions as to apprentices and aged, slow, or infirm workers, while the proposed award contained no provisions as to 'improvers', to whom, under the States Wages Boards awards, wages might be paid below the minimum rate.

The case was heard by the full Court, and there was a difference of opinion, the Chief Justice, Barton and O'Connor JJ. taking one view, and Isaacs and Higgins JJ. taking the opposite view on the question of principle.

The Chief Justice[1] reiterated the views which he had expressed in the *Woodworkers'* case. He held that the power of the Parliament under s. 51 (xxxv) of the Constitution to make laws with respect to conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one state was subject to the rule that any invasion by the Commonwealth of the sphere of the domestic concerns of the states appertaining to trade and commerce was forbidden except in so far as the invasion was authorized by some power conferred in express terms or by necessary implication. The term arbitration denoted a judicial tribunal, and although the functions of the tribunal differed from those of ordinary tribunals in as much as they were not limited to determining existing cases, but extended to prescribing conditions to be observed in future contracts, nevertheless, the tribunal was no less a tribunal, and it was an essential part of the creation of a tribunal that it should be obliged to decide in accordance with law.

The tribunal had the power to order anything which the parties could lawfully agree to do, but could not order the parties to take any step which was not legal. It was argued in favour of the power of the Federal Court that if the

[1] 10 C. L. R. 266, at pp. 278 seq.

arbitrator must obey the law he would be unable adequately to settle disputes, and that the award of the Arbitration Court being a federal law was paramount over the state law. The former proposition was so extraordinary a one that it could only be accepted if express language compelled it to be accepted, and the second argument was based upon an obvious fallacy. The function of a tribunal of whatever kind was to declare and administer the law, not to make it. It was impossible to accept the argument that, though the Commonwealth Parliament had admittedly no power to interfere directly with the domestic industries or police power of a state, it might by appointing a judge and declaring him an arbitrator empower him to interfere. It had been argued that though the industrials in the respective states were bound by the state law, yet if a group of such industrials being dissatisfied with that law associated themselves with a group of industrials who were dissatisfied with the law of another state, the whole matter was potentially lifted out of the plane of state law, but he held that the notion that any group of persons could by their mere volition free themselves from the obligations of the law with which they were dissatisfied, without the aid of a competent legislator, was inconsistent with the elemental conception of the law.

The Chief Justice held, however, that the actual award proposed could be maintained on the ground that the parties to the case could legally have agreed to do what the award proposed to lay down. The minimum was higher than that laid down by the Wages Boards, and therefore if the higher minimum were paid, the state law would not be broken, and he so construed the award as to render it consistent with the rules as to the payment of old, slow, and infirm workers contained in the Victorian law. He felt some difficulty as to the form of indenture of apprenticeship which it was proposed to acquire, as the law of South Australia laid down another form, but he considered that that objection was not fatal.

The Chief Justice noted also the Act No. 2241 of Victoria passed after the special case had been brought before the

Court, which attempted to provide that the determination of a special Board on the Court of Industrial Appeal of Victoria should be the final authority as to conditions of labour. He considered, however, that this enactment did not attain the effect at which it aimed, for the legislation could only affect powers over which the Victoria Legislature had legislative authority, and in any case the words of the section left open the whole field of agreement with which in his opinion the field of arbitration was coterminous, and as that field was by the Constitution left open to the arbitrament of the Federal Court, no statute of a state could effectually close it in the face of the Court.

Barton J.[1] who had not taken part through illness in the decision of the *Woodworkers'* case, accepted the view of the majority of the Court. He recognized the supremacy of the legislation of the Commonwealth where the Commonwealth and the state had equal powers of legislation, but he pointed out that the Constitution was a federal one and that the principle had been accepted that it must not be interpreted so as to enable the Commonwealth to interfere with matters which were intended to be reserved to the state, as in the case of the field of industrial matters according to the rulings in the case of *Huddart Parker & Company Proprietary Ltd.* v. *Moorehead*[2] and the *Union Label* case.[3] Applying these principles to the subject-matter in dispute he held that the range of the Court's authority was co-extensive with the powers of the parties to settle their dispute without it, but the Court could not make for them an agreement in face of the mandate of positive law. The Commonwealth could not legislate directly to interfere with industrial conditions, and it could not do so indirectly by creating an Arbitration Court. The decisions of the Court of Arbitration were judicial, not legislative acts, and therefore did not override state laws. Like the Chief Justice, he could not accept the argument that because there was discontent in two states the Court could disregard the laws of both. Again, like the Chief Justice, he thought that, on the principle which he laid

[1] 10 C. L. R. 266, at pp. 289 seq. [2] 8 C. L. R. 330. [3] 6 C. L. R. 469.

down, the actual awards were consistent with the determinations of the States Wages Boards, and, for the same reason as that given by Griffith C.J., he held that the Victoria Act, No. 2241, did not affect the point at issue.

O'Connor J.[1] repeated the principles he had laid down in the *Woodworkers'* case. He elaborately considered the meaning of the term ' arbitration ', and he pointed out that the power of the Court could only be effective in some cases by varying the terms of existing contracts, and by disregarding the laws of the states by which the existing rights of contract were recognized and enforced. But beyond this it was impossible for the Court to disregard the states laws, and the award must be in accordance with state law except in so far as the disputants might themselves have lawfully agreed to the state law being disregarded. He pointed out also that rights created by an award of a state industrial tribunal in settlement of an industrial dispute stood on no higher ground than rights conferred by contract, and must be clearly distinguished from the determinations of Wages Boards which were legislative enactments of the states. To adopt the principle contended for by the federation would be to enable the Commonwealth indirectly to override the states' control of industrial matters which the Court had assigned to the states.

O'Connor J., like Griffith C.J. and Barton J., held that the actual awards were not inconsistent with the state legislation. He pointed out, however, that the result of the difference between the form of apprenticeship indenture and that legal in South Australia would have the result that in future no apprenticeship in the boot trade could be created there, and he suggested that the President should modify his proposed award so as to avoid this result. He held that the Victoria Act was powerless to alter the position.

On the other hand, Isaacs J.[2] was of opinion that an award of the Federal Court could override the awards of the States Wages Boards. He insisted that, unless the determinations

[1] 10 C. L. R. 266, at pp. 301 seq. [2] Ibid., at pp. 310 seq.

of the Court were in the nature of a law, it had no authority whatever. There was no direction of any Parliament which he was bound to follow, and there could be no binding quality in his decrees unless it were to be found in s. 5 of the *Commonwealth of Australia Constitution Act*, which declares 'This Act and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, Judges, and people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state'. If this power were not held to be granted to the Court it would be impossible for it to perform any effective function. He contended at length that it was impossible to hold that arbitration merely meant that the state laws must be obeyed. The Constitution had selected arbitration as the mode of Commonwealth action in dealing with industrial disputes because arbitration was a judicial act, and had the advantages of being a judicial act. By requiring arbitration the Constitution secured that the substantial requirements of justice should be observed, that the parties must both be heard, that the Court must act honestly and impartially, and so forth. It was thought proper not to legislate directly to empower the Commonwealth to fix rates of wages or numbers of hours for the settlement of disputes. It preferred to do so by the method of arbitration in view of the fact that Parliament was unfitted to inquire into facts dependent upon evidence. The decisions of the Court must be regarded as an exercise of the legislative power, and it stood on the same footing in that regard as the determinations of the States Wages Boards, which also were legislative acts, but which were subject to be overridden by the paramount authority of Commonwealth legislation. A judgement of the High Court declaring the law was binding on the people of the state; if founded on state law the State Legislature could alter the law, but it could not reverse the judgement. On the other hand, a federal award prescribing industrial conditions was not an interpretation of the law, but introduced new obligations. This was legislation by means of a subordinate body acting under the Imperial authority, and

a state law laying down a different rule was necessarily antagonistic to the award itself.

Isaacs J. considered that this view was strengthened by the case of the arbitration as to the assets and debts of Upper and Lower Canada under s. 142 of the *British North America Act*, 1867. In that case there were to be three arbitrators representing Canada, Ontario, and Quebec. The Quebec arbitrator resigned owing to a dispute, and the other two delivered a decision. It was contended by Quebec before the Privy Council that the arbitration was stayed by resignation of its arbitrator, but this obligation, which would have been fatal to an ordinary arbitration, was held by the Privy Council not to be fatal to the award of the other two arbitrators.[1]

There was no state law which could be applicable to a dispute extending beyond one state. When a quarrel attained national proportions, when the discordant laws of the states proved powerless to restrain the strife and to prevent its extension, when the other states were directly involved in the actual dispute, and the whole industrial and domestic system of the continent was deranged, when internal trade was everywhere obstructed, and interstate and foreign commerce impeded and imperilled, was it conceivable that the Commonwealth power at such a crisis was at the caprice of the states, possibly of one against the will of all the rest, to stand in danger of paralysis and defeat?

He also pointed out that if the principle accepted by the majority of the Court was sound, why should it be restricted to state statutes? Why should the arbitrator be empowered to disregard the common law, which was as much the law of the state as the statute law? And again, assuming that the award of the Federal Court was a mere judgement, why should it be held to be superior to the award of a State Court? It was not appellate, and it was not the interpretation or enforcement of any Commonwealth law. He was, therefore, disposed to hold that the proposed award could override any state law, but he agreed in any case that there

[1] See 4 Cart. 712; 28 S. C. R. 609.

was no inconsistency so far between the proposed award and any state law up to the present moment, and that the language of the Victorian Act No. 2241 was insufficient to annihilate the federal power.

Higgins J.[1] reiterated the view which he had laid down in the *Federated Saw Mill Employés* case. It was clearly the intention of the Federal Parliament that the order of the Court should override any State Wages Board determination, and the only question was whether that intention as expressed in ss. xxxv of the Federal Act was *ultra vires*. If the Court had not that power it could not effectively settle disputes. The Arbitration Court of New South Wales had held that bootmakers were entitled to a minimum wage of 9*s*. a day, but could not award more than 8*s*. as Melbourne manufacturers were only required to give 8*s*. Or again, in one case employees were willing to have a dispute settled on the basis of ordinary pay on Sundays if forty-eight hours in the week were not exceeded, but the Victoria Wages Board determination required that time and a half must be paid for Sunday work. It appeared to him clear that a federal award overrode any state law under clause v of the Constitution Act. It was true that an award was not an Act, but the Act plus the award was a law just as in the case of *Powell* v. *Apollo Candle Company*.[2] He pointed out that it was admitted that a Wages Board determination was a law of the state, and he could see no conceivable distinction between it and the determination of the Arbitration Court. He thought, too, the same result might follow under s. 2 of the *Colonial Laws Validity Act*, for the Constitution gave power to establish a Court of Arbitration, and the award was an order or regulation made under the authority of the Constitution Act, which was an Imperial Act.

It was true that arbitration connoted subjection to the existing laws, but only to such laws as bound the arbitrators, —to laws which created them, not to state laws which had nothing to do with them. In the *Alabama* Arbitration the arbitrators expressly held that it was no answer on the part

[1] 10 C. L. R. 266, at pp. 331 seq.

[2] 10 App. Cas. 282.

of Great Britain that it had no power to take the steps, the omission to take which was charged against it by the United States Government. Moreover, the Arbitration Court had a different function from ordinary Courts of law. It was to prescribe rules of conduct between master and men, and not to declare existing laws. It was admitted by all that the Arbitration Court could override existing agreements and existing state arbitration awards as distinct from Wages Board determinations, and he could not see any ground on which the distinction was drawn. The key of the situation lay in the fact that no state law applied or could apply to two-state disputes, and therefore the Arbitration Court could not be bound by state laws. The power of the Court was one to settle disputes, and only incidentally did it fix labour conditions, but when it did so fix them it prevailed over all state laws. He applied to the case the propositions laid down by the Chief Justice in *D'Emden* v. *Pedder*,[1] which he quoted, and he insisted that the doctrine which had been enforced in that case, where the obstruction of federal action was only trifling and theoretical, might much more confidently be invoked where the Court of Arbitration could not effectively settle a dispute without being free to prescribe a uniform system for employers and employees in states which had differing labour laws.

This view he supported by American cases and also by Canadian cases, including the case of *Compagnie hydraulique de St. François* v. *Continental Heat and Light Company*,[2] where it was laid down by the judicial committee that when a given point of legislation was within the competence both of the Parliament of Canada and of the Provincial Legislatures, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province.

On the other hand, he considered that the decision of the Court was in substance correct, and that there was no inconsistency between the proposed award and the state board awards and determinations. With regard to the *Factories and Shops Act* of Victoria, No. 2241, he pointed out that

[1] 1 C. L. R. 91, at pp. 108, 109.

[2] [1909] A. C. 194.

the Act was open to serious objection, as interference with existing litigation was most unusual and unprecedented, a phrase which he would hardly have used if he had remembered recent legislation in Ontario.[1] His view of the Act was that no Act of any state could prejudice the rights of the Federal Parliament and of the Federal Arbitration Court under the Constitution.

The powers of the Commonwealth Court of Conciliation and Arbitration were further considered in the case of *The King* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Company.*[2] The case is of particular interest as several important collateral questions were raised.

In that case an application had been made to the President of the Court—Mr. Justice Higgins—by the Australian Boot Trade Employés' Federation asking for the intervention of the Court in an alleged industrial dispute between the federation and certain employers carrying on business as boot manufacturers in the States of New South Wales, Victoria, Queensland, and South Australia. He made an award on certain points, and in accordance with the terms of the *Conciliation and Arbitration Act*, 1904, he exercised the power of declaring his award to be a common rule for the whole trade.

The employers, being unable to bring an appeal from the award itself under the Act, which by s. 31 forbids an appeal, applied for and obtained a rule nisi for a prohibition to restrain the Court and the Boot Trade Employés' Federation from further proceedings upon the order and award. They claimed among other things that the Act of 1904 was unconstitutional and beyond the powers of the Parliament of the Commonwealth. On the other hand, it was objected on behalf of the Boot Trade Employés that the High Court had no power to issue prohibition against the Commonwealth Court of Conciliation and Arbitration.

This objection to the jurisdiction of the Court was rejected

[1] Cf. 6 Edw. VII. c. 12; 7 Edw. VII. c. 15; 8 Edw. VII. c. 22; 9 Edw. VII. c. 19; above, pp. 745 seq.

[2] (1910) 11 C. L. R. 1.

by all the four justices by whom the case was heard. The point for the Employés' Federation was put in two ways. In the first place, it was argued that a prohibition was within the language of s. 31 of the Act of 1904, which enacted that 'no award of the Court shall be challenged, appealed against, reviewed, quashed or called in question in any other Court on any account whatsoever'. Or as it was also put under the Constitution, s. 73, an appeal lay to the High Court from every Federal Court unless otherwise enacted by Parliament, and as an appeal had been denied by s. 31, the jurisdiction of the Court was thus denied on any question which could be raised by appeal. To this argument Griffith C.J.[1] pointed out as a complete answer that in the first place in *Clancy's* case[2] the Court had decided on identical words in the New South Wales *Industrial Arbitration Act*, 1901, that the enactment did not apply to cases in which an inferior Court had exceeded its jurisdiction, and in the second place, even if no appeal lay to the prohibiting Court it did not follow that enforcement of the judgement might not be prohibited by a Court having jurisdiction to make an order, and in the great majority of cases of prohibition the prohibiting Court was not a Court of Appeal from the Court prohibited.

The other ground of objection was that the Court had no original jurisdiction to grant prohibition to an inferior Federal Court. To this the answer was—according to the Chief Justice—that s. 75 (v) conferred original jurisdiction upon the High Court in all matters in which a writ of mandamus or prohibition or injunction was sought against an officer of the Commonwealth. Prohibition did not lie except to persons exercising judicial or quasi-judicial functions, and it could not be denied that the judge of the Arbitration Court was an officer of the Commonwealth or that his functions were judicial. Even if the words of s. 75 were ambiguous, the necessity of such controlling power was so apparent that the ambiguity should be resolved in favour of the power. But in any case the Court clearly had jurisdiction under

[1] 11 C. L. R. 1, at pp. 20 seq.

[2] 1 C. L. R. 181.

the express words of s. 76 of the Constitution, which authorized Parliament to confer jurisdiction on the High Court in any matter arising under or involving the interpretation of the Constitution or arising under any law made by Parliament, and s. 33 of the *Judiciary Act*, 1903, which authorized the Court to make orders or direct the issue of writs requiring any Court to abstain from the exercise of any federal jurisdiction which it did not possess.

Barton J.[1] concurred in the view of the Chief Justice on this point. O'Connor J.[1] held that s. 71 of the Constitution,[2] which declares that the judicial power of the Commonwealth shall be vested in the High Court of Australia, was sufficient to confer upon the High Court the power to keep inferior Courts of the Federal judicial system from exceeding their jurisdiction. It was also given by s. 75 (v) which clearly applied to judicial as well as to non-judicial officers. Moreover, s. 76 of the Constitution and s. 33 (b) of the *Judiciary Act* gave the power, even had it not been given by the other sections of the Constitution.

On the other hand, Isaacs J.[3] held that s. 75 (v) did not confer the power in question. Prohibition to another Court was not original but appellate jurisdiction. The power given in s. 33 (b) of the *Judiciary Act* must be exercised within the range of the original jurisdiction conferred, to which it was expressly restrained, but he held that s. 31 of the *Conciliation and Arbitration Act*, 1904, did not cover the entire field of appellate jurisdiction as used in s. 73 of the Constitution. The expression appealed from in that section was used in the sense of the correction of error in the course of adjudication, and not as including a denial of jurisdiction to adjudicate. When the Legislature intended to take away entirely the power of the superior Courts to keep subordinate tribunals within the limits assigned, clear words were invariably used, as in s. 52 of the New South Wales *Industrial Disputes Act*, 1908.[4] No such provision had been made in this case, and

[1] 11 C. L. R. 1, at p. 33.
[2] 11 C. L. R. 1, at pp. 40–2.
[3] 11 C. L. R. 1, at pp. 47–9.
[4] *Baxter* v. *New South Wales Clickers' Association*, 10 C. L. R. 114.

the form of words employed did not indicate that the Parliamentary exception was intended to be as wide as the constitutional grant, and consequently the power to prohibit for want or excess of jurisdiction remained.

On the main question the opinion of the Chief Justice [1] was as follows. The questions at issue were, in the first place, that the constitution of the Court was not such as was authorized by the power given in the Constitution to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes, and secondly, that several provisions of the Act itself, notably that relating to the common rule, were not within the power granted, and that those provisions were so intimately bound up with the rest of the Act that if they were eliminated the rest of the Act would have a substantially different character, and the whole Act was therefore invalid. In favour of the first contention it was argued that the concept of arbitration as it existed in 1900 presumed that (a) the submission was voluntary, (b) that at least some part of the tribunal was chosen by the disputants themselves either directly or indirectly, (c) that the tribunal was not fettered by the ordinary formalities of legal procedure, and its functions were not limited to determining existing rights but it could prescribe rules of conduct for the future within the limits of law, and (d) that the function of an arbitrator was a judicial function to be exercised after hearing both sides. The Chief Justice pointed out that in his opinion the list of statutes which was mentioned by Isaacs J. did not permit of doubt that the voluntary submission and the choice of arbitrators were not an essential part of the term ' arbitration ', the words ' arbitrator ' and ' arbitration ' having been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land. He therefore dismissed the first two parts of the first objection to the validity of the Act. With regard to the latter two he

[1] 11 C. L. R. 1, at pp. 22 seq. See also pp. 315–20.

held that the proceedings must be of a judicial character and that the arbitrator must not legislate. With regard to the provisions of s. 38 of the Act relating to the common rule which purported to authorize the Court to declare that any conditions of employment determined by an award should be a common rule of an industry, and of s. 39, which provided that a state law or an award should yield to an award by a Court, he pointed out that the second was *ultra vires*,[1] and with regard to the first, while not deciding, as it was unnecessary for the purposes of the case, he assumed that the provisions objected to were *ultra vires*. But assuming that these provisions were *ultra vires*, he still thought that they were severable from the other provisions of the Act. It had been contended on the strength of decisions of the Supreme Court of the United States that if the Court, on a consideration of the whole statute and rejecting the part held to be *ultra vires*, were unable to say that the Legislature would have adopted the rest without them, the whole statute must be held invalid. But this test he thought inaccurate. What a man would have done in a state of fact which never existed was a matter of mere speculation, which a man could not certainly answer for himself, much less for another. The safer test was whether the statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remained from what it would be with the omitted portions forming part of it. On the whole he was unable to say that the Act, with the alleged invalid provisions omitted, was substantially so different a law as to what was left from what it would be with those provisions included that the Court would by substantiating the validity of what was left be making a law which the Parliament did not make. He proceeded, therefore, to uphold the validity of the determination in the actual case, subject to certain qualifications which are not material to the question at issue.

Barton J.[2] agreed that arbitration did not include a power

[1] As decided in 10 C. L. R. 266.

[2] 11 C. L. R. 1, at pp. 34 seq. See also pp. 320–5.

to the arbitrator to regulate a particular trade. That would be giving the tribunal a power to legislate which no torture of words could twist into arbitration. The Arbitral Tribunal must at any rate be judicial and not legislative. It could not overpass the area of the dispute as to the subject-matter or as to disputants, nor could the settlement be something to which the disputants could not, if they would, agree. If that which purported to be a settlement affected to bind others than the disputants, the function performed by the tribunal was not arbitration any more than such a decision by a Court would be a judgement. He did not decide as to s. 38 of the Act authorizing the declaration of the common rule, but assuming its invalidity, he still held that the provisions questioned did not affect the valid portion of the Act, which therefore had due effect.

O'Connor J.[1] also declined to pass an opinion on the common rule provision on the ground that it was separable, and he concurred in the judgement proposed by the Chief Justice.

Isaacs J.[2] showed that arbitration did not exclude a possible choice of arbitrators, and he quoted a long series of Imperial Acts[3] in favour of this contention, and he also referred to the Canadian Act, No. 40, of the *Revised Statutes* of 1886. He went in detail through the sections of the Act which were alleged to be invalid, and showed that in most cases no real question arose. On the other hand, the question of the common rule did give rise to some difficulty. On the one hand the provisions had the appearance at first sight of regulations not necessarily dependent upon actual or threatened disputes, and on the other hand they seemed absolutely necessary to the effective application of the remedy of conciliation and arbitration for the prevention and settlement of disputes. The preventive jurisdiction was certainly intended to be a real and substantial power

[1] 11 C. L. R. 1, at pp. 42 seq. See pp. 325–9. [2] 11 C. L. R. 1, at pp. 49 seq.

[3] 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 26 & 27 Vict. c. 112; 31 & 32 Vict. c. 119; 37 & 38 Vict. c. 40; 45 & 46 Vict. c. 56; 51 & 52 Vict. c. 41; 53 & 54 Vict. c. 70; 63 & 64 Vict. c. 59.

as preserving the peaceful course of industry, and its operation might prove more beneficial than the actual settlement of disputes after they had broken out, and he was not satisfied that sufficient weight had been given in the argument to this phase of the power and the effect of the word 'preserve', or the word 'arbitration', or the expression 'industrial dispute' in its ampler constitutional signification. But he did not propose to express a decided opinion upon the matter, partly because the constitutionality of the Act was not raised before the President of the Court, and the Court had not the advantage of his presence or of a case stated by him. The provisions were in his opinion separable, and he accepted as a principle of discrimination the rule[1] that if good and bad provisions were included in the same word or expression, the whole must fail; where they were contained in separate words or expressions, then if the good and the bad parts were so mutually connected with and dependent upon each other as to lead the Court upon applying the language to the subject-matter to believe that Parliament intended them as a whole and did not pass the good parts as independent provisions, all the provisions so connected and dependent must fall together.

The opinions of the judges in the case as to the common rule left little doubt of the result of the submission of that point formally to them, and in point of fact they declared it invalid shortly after.[2] The conclusion was nearly inevitable from their method of approaching the case: if the terms of the Act are to be strictly construed, it is fair to say that the power granted is one to settle actually existing disputes, not a legislative authority.

It is difficult to overestimate the importance of this decision as limiting the utility of the Court, and its importance is best seen from the fact that the Opposition were agreed that a change in the Constitution which would allow of the common rule being made possible was desirable. Thus Mr. Cook, in his amendment on the second reading of the Legislative

[1] Cf. per Shaw C.J. in *Warren* v. *Mayor of Charlestown*, 2 Gray, 84, at p. 99.

[2] *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.*, 11 C. L. R. 311. Even Isaacs (pp. 329–38) and Higgins (pp. 338–46) agreed,

Powers Bill, expressly admitted that some alteration was necessary in view of the decision.[1] He moved, therefore, as an amendment to the Legislative Powers Bill, a provision in favour of the maintenance of the industrial clauses of the Constitution, subject, however, to the Commonwealth having power to regulate the conditions of employment in all industries which were federal in operation, or which could not be effectually regulated by any one state, and further to enable the Inter-State Commission to prevent and remove unfair competition between the same industries carried on in different states, and some such solution seems necessary.

The question of the power of the Commonwealth Parliament as regards land taxation was discussed at great length in 1910 on the Land Taxes Acts of the Government. These Acts are simply and solely measures for taxation, for their end is not revenue but the breaking up of large estates,[2] and their validity has been contested before the High Court on the broad ground that they interfere with the control by the states of their land policy, and are not really taxing Acts at all, but the Court unanimously rejected this view.

It may also be mentioned that a proposal to establish a central agricultural bureau has caused some annoyance in the states,[3] and there has been friction with Western Australia over the refusal of the States Government to allow prison warders to remain members of the Commonwealth defence forces.[4] The validity of the state inspection laws and laws against plant disease importation has also been discussed,[5] and as regards inter-state importation are seemingly quite valid.

[1] *Parliamentary Debates*, 1910, p. 5035. Contrast the view of Sir J. Quick, at p. 4935.

[2] Senator Vardon, ibid., p. 5566, suggested the title Land Confiscation Bill, which the President ruled out of order. See *Osborne* v. *The Commonwealth*, in Sydney *Morning Herald*, June 1, 1911.

[3] See Commonwealth *Parliamentary Debates*, 1910, pp. 4218 seq.

[4] Ibid., pp. 4747 seq., 5701, 5892, 6203; Western Australia *Parliamentary Debates*, 1910, pp. 1448 seq., 1498.

[5] See Sir J. Quick, Commonwealth *Parliamentary Debates*, 1910, p. 407; opinion of Mr. Glynn, A.G., in *Parl. Pap.*, 1909, No. 63, on South Australian Proclamation as to grape vines, August 14, 1909, under the

(e) *The Referenda of* 1911

As the result of the unsatisfactory position as to the powers of the Commonwealth Parliament the Labour Government secured the passing through the Commonwealth Parliament of two Bills which, had they been accepted at the referendum on April 26, would have given to the Parliament of the Commonwealth all necessary power to deal with questions affecting trade and labour conditions.

It was proposed by the first Bill, the *Constitution Alteration (Legislative Powers) Bill*, 1910, to amend s. 51 of the Constitution by omitting from paragraph (i) the words ' with other countries and among the states ', thus giving to the Parliament full power to deal with trade and commerce throughout the Commonwealth, and by inserting as a new paragraph xx, in place of the old paragraph which ran ' Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth ', the new clauses already cited which extend the powers of the Parliament as to (*a*) the creation, dissolution, regulation, and control of Commonwealth corporations ; and as to state and foreign corporations.[1]

The old paragraph xxxv of s. 51 of the Constitution was to be altered by omitting the words ' Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state ', and inserting in their place the words ' Labour and employment including (*a*) the wages and conditions of labour and employment in any trade, industry, or calling, and (*b*) the prevention and settlement of industrial disputes, including disputes in

Vine, Fruit, and Vegetable Protection Act, 1885 (No. 345). Cf. also the Tasmania Act No. 5 of 1909 regarding potatoes. Cf. also the dispute against the federal regulation limiting the weight of corn sacks, Victoria *Parl. Pap.*, 1908, No. 21, p. vii.

[1] See especially *Parliamentary Debates*, 1910, pp. 4676 seq., 4801 seq., 4912 seq., 5014 seq., 5185 seq., 5294 seq., 5395 seq., 6170 seq. For a criticism, cf. Turner, *Australian Commonwealth*, pp. 297 seq. The Australian newspapers from March to April are full of discussions regarding the Bills. Cf. Keith, *Journ. Soc. Comp. Leg.*, xii. 119, 120.

relation to employment on or about railways the property of any states '.[1] Moreover, as noted above, a further paragraph was to be added to s. 51 empowering the Commonwealth to legislate in respect of combinations and monopolies in relation to the production and manufacture or supply of goods and services.

The second Bill empowered the Commonwealth to make laws for carrying on an industry or business by or under the control of the Commonwealth and to acquire for that purpose on just terms any property used in connexion with the industry or business, provided that each House of the Parliament in the same session had by resolution declared that the industry or business of producing, manufacturing, or supplying any specified goods, or of supplying any specified services, was the subject of a monopoly.[2]

The question what use would be made of this great power naturally aroused much interest in Australia, and the Acting Premier, Mr. Hughes,[3] issued to the press on December 9 a memorandum which he had addressed to the States Premiers regarding the scope of Federal legislation under the new constitutional powers to be given to the Commonwealth.

He anticipated that the legislation passed would include

[1] In addition to the cases involving questions of state rights may be mentioned, *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Broken Hill Proprietary Co. Ltd.*, (1909) 8 C. L. R. 419 ; *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association*, 6 C. L. R. 309 ; *Colliery Employés' Federation of the Northern District, N. S. W.* v. *Brown*, 3 C. L. R. 255 ; *Master Retailers' Association of N. S. W.* v. *Shop Assistants' Union of N. S. W.*, 2 C. L. R. 94.

[2] See *Parliamentary Debates*, 1910, pp. 5415 seq., 5485 seq., 5614, 6184.

[3] The Labour party in South Australia unreservedly threw in its lot with the Federal Labour party on this referendum (see a criticism by Mr. Peake in the *Register*, January 9, 1911). The Labour party in Western Australia and in New South Wales was less clear in its approval, but the refusal of the party in New South Wales to allow discussion though pressed by Mr. Wade, indicates its attitude adequately. The 'Liberal' party in the state carried on a propaganda for the opposition to the referenda, and this plan was adopted by the Liberals in Victoria, Queensland, Tasmania, South and Western Australia. The *Age* threw its influence against labour.

legislation to enforce the new protection policy, and such amendments of industrial legislation as might be necessary for the prevention and settlement of industrial disputes and to secure a fair and reasonable wage for all classes of workers where those matters had been only partially secured or altogether neglected by state legislation. Any necessary legislation to deal with trusts and combines would be passed when required to cope adequately with them. But the greater part of the state laws would not be affected at all; it was not the intention of the Commonwealth to trespass upon the domain of the states, but to operate effectively in a sphere in which the states could not by reason of geographical limitations and circumstances operate effectively and unaided. Steps would be taken to supplement states wages boards and states tribunals, but not to supersede them. The states would still retain great and important powers, including land and settlement, development, and protection of natural resources, roads, forests, mines, water conservation and irrigation, education, public health, social relations, criminal law generally, civil law generally, contracts, torts, real and personal property, &c., liquor and licensing, state constitution and government, municipal and local government, state railways, state works and undertakings, state taxation, state insurance, state banking, administration of justice and legal procedure, police, &c.

As against the bold decision to alter the Constitution may be set the scheme agreed upon in 1909 [1] by the State Premiers and the Deakin-Cook administration. The plan then was by legislative action of the state under s. 51 (xxxvii) to allow industrial disputes which could not be settled by state action to be referred to an Inter-state Commission on the motion of a State Court if it found that it was not possible for state tribunals to settle matters because of unequal conditions of

[1] Commonwealth *Parl. Pap.*, 1909, No. 50; Harrison Moore, op. cit., pp. 619–21. The nature of the legislation necessary both to amend the Constitution and carry out the purpose of the amendment is indicated in Mr. Glynn's memorandum of August 1909, published in *Parl. Pap.*, 1910, No. 51, pp. 7, 8.

labour in other states, the special offender being Tasmania, which, however, in 1910 reformed, by passing a Wages Board Act, a Workers' Compensation Act, and a Factories Act of the usual type. The scheme was more or less attractive, but went out with its authors' defeat.

An appeal was made to the electors by Mr. Deakin as the chief mover in the scheme of 1909, in a letter dated December 1, 1910, in which he argued that the arrangements proposed went far beyond what is necessary. He thought that public opinion was now ripe for bringing trusts, combines, and corporations under the law, and harmonizing competitive industrial conditions throughout the Commonwealth. The proposed arrangements, he stated, destroyed the federal principle, and defeated the development of local self-government; they were vague and indefinite and theoretical and speculative. He criticized the combination of so many different points in the Legislative Powers Bill which rendered it difficult for the electors to pronounce a free vote. Endless litigation and friction would be caused; the Commonwealth could cut down the revenue of the railway system without accepting responsibility, or increase their annual working cost without responsibility. The result of the Commonwealth action would produce a wooden uniformity incompatible with the interests of the Commonwealth.

The need of the increase of the powers of the Commonwealth was in the opinion of the Labour party [1] increased by the decision delivered in the latter part of December 1910 by the High Court with regard to the powers of the Commonwealth as to regulating the coasting trade.

(*f*) *The Coasting Trade*

The question of the legislative authority with regard to coasting trade was considered by the High Court of the Commonwealth in the case of the *Seamen's Compensation Act* of 1909. In the case in question, decided in December 1910—*SS. Kalibia* v. *Wilson* [2]—the vessel was chartered to

[1] See e.g. Sydney *Bulletin*, March 30, 1911.

[2] Keith, *Journ. Soc. Comp. Leg.*, xii. 116 seq.

carry cargo from New York to Australian ports, which under the charter were to be Adelaide, Melbourne, Sydney, and Brisbane. No other trading was contemplated by the charter, but as a mere matter of courtesy a small package (7 lb. in weight) which had been part of the cargo of another ship, and had been inadvertently left behind at Adelaide, was carried by the captain to Brisbane. No charge was made, no bill of lading or shipping note was signed, and the package was not entered in the ship's manifest. The respondent shipped at Sydney as a seaman for the voyage to Brisbane and back, and was injured by an accident before the ship reached Brisbane, where he was discharged. It was sought by the respondent to have the ship detained under the power conferred by s. 13 of the Act, which provides that if it is alleged that the owner of a ship actually within the territorial waters of Australia is liable as such to pay compensation under the Act, a Justice of the High Court or a Judge of the Supreme Court may issue an order for detention of the ship until security has been given for payment of compensation. By s. 4 of the Act it was made to apply to the employment of seamen engaged in the coasting trade, and a ship was to be deemed to be engaged in the coasting trade ' if she takes on board passengers or cargo at any port in a state . . . to be carried to and landed and delivered at any port in the same state . . . or another state '.

Mr. Justice Street made an order for the detention of the vessel, and Mr. Justice Gordon refused to discharge the order, and from this order an appeal was brought on two grounds : (1) that upon the undisputed facts the Act did not apply to the ship in question, and (2) that the Act was not within the powers of the Parliament of the Commonwealth.

The Court held that the first ground for appeal was clearly justifiable. It was laid down that as a general rule a ship could not become engaged in the coasting trade without the knowledge and volition of the owner or of some person for whose acts he was responsible. There was nothing to suggest that the chief officer or the master who offered no objection had any authority on behalf of the owners to engage the ship

in the coasting trade even if the isolated transaction were otherwise within the words of the section. The words ' taken on board ' and ' to be carried ' imported a contract of carriage made on behalf of the ship, and did not include a promise made by a passenger or any other person not authorized to bind the owner to carry on board the ship goods as to which the owner did not incur any responsibility.

The Court, although they considered that the matter could be disposed of on that ground, decided, as the Commonwealth had intervened by permission, to give a decision on the general question of the validity of the Act. Two objections were made to its validity. First, that provisions for compensation to seamen could not under any circumstances fall under the trade and commerce power of s. 51 of the Constitution; second, that if they did the particular Act was invalid for another reason. The first question the Court declined to deal with on the ground that it was abstract, but the second question they dealt with in detail. S. 4, subsection 1, provided that the Act applied in relation to the employment of seamen (*a*) on any ship registered in the Commonwealth when engaged in the coasting trade, and (*b*) on any ship (whether British or foreign) engaged in the coasting trade if the seamen had been shipped under articles of agreement entered into in Australia.

It appeared, therefore, that the law applied to all trade between different Australian ports, and not merely to trade between ports of different states; if there were any doubt about this as regards subsection 1 it was made clear by the terms of subsection 2, which expressly declares that a ship is to be deemed to be engaged in the coasting trade if she takes on board passengers or cargo at one port in a state to be carried to and landed at another port in the same state. Now it was not open to argument that the power to make laws with respect to trade and commerce with other countries and among the states given by the Constitution extended to authorize the Parliament to legislate with respect to the internal trade of a state. It followed that the provisions of s. 4 of the Act went beyond the powers of the Parliament

so far as they purported to regulate purely internal coasting trade, and were to that extent invalid. Then the Court considered whether the valid provisions could be separated from the invalid provisions, and they laid down, as in the *Railway Servants'* case[1] and the *Bootmakers'* case,[2] the principle that when in the attempted exercise of a power of limited extension an Act is passed which in its terms extends beyond the prescribed limits, the whole Act was invalid unless the invalid part was plainly severable from the valid. They held that in this case to interpret the law as referring only to inter-state trade would be to create a new law, and not to carry out the intended law. When the Legislature assumed jurisdiction over a whole class of ships, over some of which it had and over others it had not jurisdiction in point of law, and plainly asserted its intention to place them on the same footing, the Court would be making a new law if it gave effect to the statute as a law intended to apply to part only of the class. The Court therefore held that the whole Act was invalid, and reversed the decision of the Court below.[3]

It is important to note that the decision evidently treats the powers to deal with navigation as referring only to navigation between the states, and therefore that the Parliament of the Commonwealth has no power to deal with merchant shipping except in so far as shipping between the various states is concerned. Unless and until, therefore, the federal constitution is in some way amended it will be impossible for the Parliament of the Commonwealth to pass any really effective merchant-shipping legislation.

It cannot be a matter for legitimate regret that the ambiguities latent in the power of State Parliaments under s. 51 (i) should disappear. In the United States the question has caused perpetual difficulty and inconvenience, and no one need desire to see perpetuated in Australia that conflict

[1] 4 C. L. R. 488.

[2] 11 C. L. R. 1. Cf. Harrison Moore, op. cit., pp. 388 seq.

[3] They dismissed summarily the argument that the Court had admiralty jurisdiction.

of law with monopolies and trusts which is clearly favoured by the vagueness of the powers of Congress.[1]

(*g*) *The Result of the Referenda*

By March the newspapers of the Commonwealth revealed doubt as to the possibility of the referenda becoming law. With a rare unanimity the ordinary press was opposed to the changes in the Constitution, and naturally this told in a country where papers are unquestionably powerful. A marked split developed itself in the Labour party of New South Wales when Mr. Holman declared against so wholesale a taking over of the powers of states, but was reduced to silence by the decision of the party as a whole. Whatever the causes, the result was the decisive defeat of the proposals, by large majorities in every state save Western Australia. The contrast with the results of the general election of 1910 is instructive.

The last general election in the Commonwealth was held on April 13, 1910.[2] There was an election for eighteen members of the Senate, that is half of that body, who retire every three years. As each of the six states is one constituency for the election, and each elector has three votes, and there was a good deal of cross voting, it is difficult to give figures exactly.

The electorate consisted of 2,258,482 persons; 62·16 per cent. voted; the aggregate number of votes cast for the Government, which carried the whole eighteen seats, was 2,021,092; the total number of votes cast for other candidates was 1,922,414, giving an aggregate majority of 98,678.

In the case of the House of Representatives, 71 out of 75 seats were contested. The available electorate was 2,148,969; 62·80 per cent. of the electorate voted. The aggregate vote cast *for* labour members was approximately 672,000, that *against* 624,000, leaving an aggregate majority of 48,000 votes.

[1] Cf. Harrison Moore, op. cit., pp. 549–60; Quick and Garran, op. cit., pp. 515–49.

[2] See *Parl. Pap.*, 1910, No. 1.

The two Bills for the alteration of the Constitution were passed in the session of 1910 by the following majorities :

(1) *The Legislative Powers Bill.*		
House of Representatives	Second Reading	39—25 [1]
	Third Reading	41—19
Senate	Second Reading	18—9
	Third Reading	22—13.
(2) *Taking over of monopolies.*		
House of Representatives	Second Reading	40—21
	Third Reading	38—20
Senate	Second Reading	20—8
	Third Reading	24—12.

For the referenda the electorate was approximately the same as in the previous case. The result of the polling was, *for* the Legislative Powers Bill (which gave the Commonwealth full power over company law, trade and commerce, and the control as contrasted with the nationalization of monopolies) 483,356, *against* 742,704, giving a majority *against* of 259,348 votes.[2] In the case of the Bill for the nationalization of monopolies the figures were 488,668 *for*, 736,392 *against*, giving a majority *against* of 247,724 votes.[3]

There is no doubt that the position is extraordinary, because the elections of 1910 distinctly turned in great measure on the issue—whether the Commonwealth Parliament should take powers directly by amendment of the Constitution to deal with trade or commerce, or whether the plan advocated by Mr. Deakin and Mr. Cook of obtaining certain definite limited authority by the consent of and the legislation of the states should be adopted.

Before the referenda in March, Mr. Fisher, the Prime Minister, and since the referenda, Mr. Hughes, the Attorney-

[1] Amendment of principle defeated by this vote.

[2] The exact figures are, spoiled papers 20,869; totals for and against, New South Wales 135,968 and 240,605, Victoria 170,288 and 270,390, Queensland 69,552 and 89,420, South Australia 50,358 and 81,904, Western Australia 33,043 and 27,185, Tasmania 24,147 and 33,200.

[3] The exact figures are, spoiled papers 21,854; totals for and against, New South Wales 138,237 and 238,177, Victoria 171,453 and 268,743, Queensland 70,259 and 88,472, South Australia 50,835 and 81,479, Western Australia 33,592 and 26,561, Tasmania 24,292 and 32,960.

General in Australia, and Mr. Fisher, explained that the matter would again be brought before the people at referenda, probably at the next general election, which would secure party feeling and a larger vote, and that the Government would not of course resign, as it had a majority of about 12 out of 36 members of the Senate, and commanded the support of about 44 of the 75 members of the House of Representatives. Yet the majority against its proposals was about four times the majority for the party in the elections of 1910. The view held by the advocates of the reform was in the main that people had not realized the need of such large reforms, and required education. Stress must also be laid on the complications of the referenda, the active exertions of so many able politicians against it, and their unwonted unanimity, and the lack of party enthusiasm in voting on an issue separately from the voting for persons. It is now contemplated to solve, if possible, the question by a voluntary grant of power by the states.

§ 6. Judiciary [1]

The powers conferred upon the High Court of the Commonwealth by the Constitution are as follows, their exercise being regulated by the *Judiciary Act*, 1903–10, defining and explaining the general terms of the grant in the Constitution. The High Court is the outcome of a long struggle ; as early as 1849 the tentative scheme of federation contemplated a High Court, but the Act of 1885 did not provide for one. In 1870 the question was discussed as the outcome of a Commission in Victoria, but the Imperial Government was not assured of the need of any change.[2] Naturally it appeared at the Sydney Convention of 1891, and was adopted in 1900.

Cf. Clark, op. cit., pp. 153–84, who draws a distinction between the position of the High Court as the appeal court from the states, a jurisdiction which the Parliament cannot confer on any other court, and as the depositary of the judicial power, which subject to the terms of the Constitution can be divided among several courts ; see for the appellate federal jurisdiction, *Ah Yick* v. *Lehmert*, 2 C. L. R. 573.

[2] Quick and Garran, op. cit., pp. 735 seq. For the objections of Mr. Justice Richmond of New Zealand and Mr. Justice Clark's reply, see *Parl. Pap.*, C. 6466, pp. cxliv seq.

CHAPTER III

The Judicature

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgements, decrees, orders, and sentences—

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court ;

(ii) Of any other federal Court, or Court exercising federal jurisdiction ; or of the Supreme Court of any state, or of any other Court of any state from which at the establishment of the Commonwealth an appeal lies to the Queen in Council ;

(iii) Of the Inter-State Commission, but as to questions of law only ;—and the judgement of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a state in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several states shall be applicable to appeals from them to the High Court.

75. In all matters—

(i) Arising under any treaty ;

(ii) Affecting consuls or other representatives of other countries ;

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (provision is made for such suits by the *Claims against the Government Act*, 1902, and part ix of the *Judiciary Act*, 1903) ;

(iv) Between states, or between residents of different states,

or between a state and a resident of another state[1] (for the latter class of cases provision is made in New South Wales by an Act of 1897, in Victoria in 1890, in Queensland in 1866, in South Australia by Act No. 6 of 1853, in Tasmania in 1891, and in Western Australia in 1898; and also a petition of right lies at common law);

(v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;[2] the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i) Arising under this Constitution, or involving its interpretation;

(ii) Arising under any laws made by the Parliament;[3]

(iii) Of admiralty and maritime jurisdiction;[4]

(iv) Relating to the same subject-matter claimed under the laws of different states.[4]

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i) Defining the jurisdiction of any Federal Court other than the High Court;

(ii) Defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the states;

(iii) Investing any Court of a state with federal jurisdiction.[3]

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a state in respect of matters within the limits of the judicial power.[5] (This power is of very doubtful extent, but it probably does not go beyond conferring rights against the states in matters which are within the powers of legislation by the Parliament.)

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial

[1] For this, cf. Clark, op. cit., pp. 167–73. The case of states at conflict is seen in the case of boundaries between Victoria and South Australia decided May 22, 1911 (cf. *Rhode Island* v. *Massachusetts*, 12 Pet. 657), perhaps *Victoria* v. *New South Wales* and a case on the Murray river may be so decided (cf. Clark, pp. 103–17; Quick and Garran, pp. 883 seq.) if the agreement between the States is not ratified by the Parliaments.

[2] Cf. 11 C. L. R. 1, at pp. 20–2, 33, 40–2, 46–9.

[3] This has been done by all the important Acts, Defence, Copyright, Patents, Customs, Excise, Posts and Telegraphs, &c.

[4] Not yet acted upon. Cf. Quick and Garran, op. cit., pp. 797 seq.

[5] See Act No. 21 of 1902, and now the *Judiciary Act*, 1903. Harrison Moore, op. cit., p. 498.

shall be held in the state where the offence was committed, and if the offence was not committed within any state the trial shall be held at such place or places as the Parliament prescribes.[1]

These powers are thus laid down in the Act of 1903.

PART IV.—ORIGINAL JURISDICTION OF THE HIGH COURT

Extent of Jurisdiction

30. In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation.[2]

33. (1) The High Court may make orders or direct the issue of writs—

(*a*) commanding the performance by any Court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction ; or

(*b*) requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess ; or

(*c*) commanding the performance of any duty by any person holding office under the Commonwealth ; or

(*d*) removing from office any person wrongfully claiming to hold any office under the Commonwealth ; or

(*e*) of mandamus ; or

(*f*) of *habeas corpus*.

(2) This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

PART V.—APPELLATE JURISDICTION OF THE HIGH COURT

Appeals

34. The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgements whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers.

[1] *Judiciary Act*, 1903, s. 60.

[2] For such a case, see *Baxter* v. *Commissioners of Taxation, N. S. W.*, 4 C. L. R. 1087. In *Miller* v. *Haweis*, 5 C. L. R. 89, it was held that an inferior State Court acts in its federal jurisdiction only when it decides in cases on a federal question ; if it decides it on some other point, then, whether or not it has decided the federal question correctly, the High Court cannot hear an appeal direct.

35. (1) The appellate jurisdiction of the High Court with respect to judgements of the Supreme Court of a state, or of any other Court of a state from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgements whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely :

(*a*) Every judgement, whether final or interlocutory, which—

(1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of Three hundred pounds ; [1] or

(2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds ; [2] or

(3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency ;—but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court—

(*b*) Any judgement, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal ;

(*c*) Any judgement of the Supreme Court of a State given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court ;—including respectively every or any such judgement which has been given or made before the commencement of this Act, and as to which—

(1) leave to appeal to the King in Council might at the commencement of this Act be granted by the Court appealed from ; or

(2) leave to appeal to the King in Council has before the commencement of this Act been granted by the Court appealed from, and up to the commencement of this Act the conditions of appeal have been complied with within the periods limited ; or

(3) a petition for special leave to appeal to the King in Council has been lodged and is pending at the commencement of this Act.

[1] In all the new Orders in Council issued in 1909, 1910 and 1911 for the Australian States the limit is £500 (as in the old orders of 1850 and 1860), save for Tasmania, where it is accidentally £1,000, as in the order of 1851.

[2] In the case of the Order in Council £500 for Tasmania also.

(2) It shall not be necessary in any case, in order to appeal from a judgement of the Court of a state to the High Court, to obtain the leave of the Court appealed from.[1]

PART VI.—EXCLUSIVE AND INVESTED JURISDICTION

38. The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the states in the following matters :—

(*a*) Matters arising directly under any treaty ; [2]

(*b*) Suits between states, or between persons suing or being sued on behalf of different states, or between a state and a person suing or being sued on behalf of another state ; [3]

(*c*) Suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a state, or any person being sued on behalf of a state ;

(*d*) Suits by a state, or any person suing on behalf of a state, against the Commonwealth or any person being sued on behalf of the Commonwealth ;

(*e*) Matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court.[4]

39. (1) The jurisdiction of the High Court in matters not mentioned in the last preceding section shall be exclusive of

[1] Under the Orders in Council the Court itself can in *any* case give permission to appeal if it thinks fit. The State Parliaments cannot define the conditions of appeal to the High Court as proposed in the New South Wales Criminal Appeal Bill, 1911 ; see *Debates*, 1911, p. 1384.

[2] Cf. the older cases, *ex parte Marks*, 15 N. S. W. L. R. 179 ; *ex parte Rouanet*, ibid., 269 ; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena Co.*, 13 N. S. W. L. R. Eq. 101, at p. 116 ; Quick and Garran, op. cit., p. 770.

[3] The Crown in each state and in the Commonwealth becomes directly amenable to the Court, a curious result of federation, but clearly desirable ; but there is no new genus of jurisdiction in reality created, cf. *Penn* v. *Baltimore*, 1 Ves. Sen. 444. The cases could all have been dealt with by the King in Council or the Courts. The Supreme Court of Canada has no such power save by concurrent dominion and provincial legislation. Cf. *Enever* v. *The King*, (1906) 3 C. L. R. 969 ; *Baume* v. *The Commonwealth*, 4 C. L. R. 97 ; *Sargood Bros.* v. *The Commonwealth*, 11 C. L. R. 258, at pp. 309, 310 per Higgins J. ; Harrison Moore, op. cit., pp. 417–21, 491 seq.

[4] This was so held in *ex parte Goldring*, (1903) 3 S. R. (N. S. W.) 260 ; see also *Ah Sheung* v. *Lindberg*, (1906) V. L. R. 323, at p. 326 ; Harrison Moore, op. cit., pp. 400 seq.

the jurisdiction of the several Courts of the states, except as provided in this section.

(2) The several Courts of the states shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions :—

(*a*) Every decision of the Supreme Court of a state, or any other court of a state from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court.

(*b*) Wherever an appeal lies from a decision of any Court or Judge of a state to the Supreme Court of the state, an appeal from the decision may be brought to the High Court.

(*c*) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a state notwithstanding that the law of the state may prohibit any appeal from such Court or Judge.

(*d*) The federal jurisdiction of a Court of summary jurisdiction of a state shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the state who is specially authorized by the Governor-General to exercise such jurisdiction.

Several questions have been raised as to the effect of these provisions. In the first place, it was decided by the High Court in the case of *Parkin* v. *James* [1] that the provisions in s. 73 (ii) cannot be interpreted to refer only to appeals from the full Courts of the states; from these Courts, as a rule, it is that appeals lie to the Queen in Council by right, but the High Court decided that they could entertain any appeal from any Court which was in effect the Supreme Court, whether it was exercising its jurisdiction through one or more judges. This decision, which is no doubt sound in law, was very inconvenient, for it leaves it open to every suitor to go straight from one judge to the High Court, whereas the intention of the framers of the Act was no doubt not to bring about this

[1] 2 C. L. R. 315, foreshadowed by Quick and Garran, op. cit., p. 742, and accepted by the Privy Council in *Blake* v. *Bayne*, [1908] A. C. 371.

result, but merely to enable the taking of appeals to the High Court instead of taking them to the Privy Council. Moreover, in addition to placing the High Court in a somewhat undignified position, it has taken away much of the work of the Supreme Courts, and has also deprived the High Court of the advantage of the reasoned considerations of the Supreme Courts on which to found its judgements. Nor can it be doubted that the Judicial Committee will be less reluctant to upset a judgement which has nothing more solid behind it than very possibly the much diverging views of a single judge of a Supreme Court and the Justices of the High Court.

In the course of the judgement in that case the High Court had occasion, as part of the grounds of decision, to hold that the term in (ii) 'from which at the establishment of the Commonwealth an appeal lies to the Queen in Council' does not mean that an appeal must have lain of right. This conclusion was indeed inevitable, because there existed a final Court of Appeal in South Australia created by a local Act of 1837 (7 Will. IV. No. 5), and strengthened in 1861 (24 & 25 Vict. No. 5), which is still the ultimate Court of Appeal in the state, though it is no longer used, its continuance having been due to the fact that the then Chief Justice Boothby [1] was excessively unpopular from his declaring a large number of Colonial laws invalid. But the result is very inconvenient, for thus every Court can claim, as the *Judiciary Act* now stands, that appeals can go direct to the High Court from it, since it is absolutely certain that an appeal lay by special leave from any Court in the dominions to the Crown in Council. In the *Kamarooka Gold-Mining Co.* v. *Kerr* [2] there was an attempt made to go direct to the High Court from the Court of Mines in Victoria, but the High Court refused, saying that in the case in question

[1] Cf. *Parl. Pap.*, August 1862. See the Acts 7 Will. IV. No. 5; No. 31 of 1855–6, s. 14; and 24 & 25 Vict. No. 5.

[2] (1908) 6 C. L. R. 255. Contrast Quick and Garran, op. cit., p. 739. For a similar court (the Governor in Council with the Chief Justice) as the only appeal court on divorce in Western Australia, see 27 Vict. No. 19; *Thompson* v. *Thompson and Hutchins*, 11 W. A. L. R. 137.

it was not necessary to determine the question as to how far such an appeal lay, but that there was an appeal to the Supreme Court of Victoria, and that the appellants should go there first of all. The decision was obviously a wise one, else the High Court would cease to be able to perform its functions at all, being obstructed with all sorts of appeals before they have been sifted out and reduced to order by consideration by a Supreme Court.

It will be seen that the *Judiciary Act* endeavours to treat the whole creation of federal jurisdiction as a new thing, and to remove it from the ordinary category of business before the State Court, by vesting it in that Court by a Commonwealth Act. There seems to be no legitimate ground of objection to these provisions: it is clear that before they were passed the State Courts could and did properly deal with cases involving federal questions, since the Constitution is by s. 5 of the covering Act binding upon them, and they might easily have to interpret its clauses. But after the Act the jurisdiction was not state jurisdiction, and if that were the view of Hodges J. in the case of *Webb* v. *Outtrim*[1] before the Supreme Court of Victoria it cannot be defended. There is certainly adequate authority in the Commonwealth Constitution for the Parliament to remove all federal jurisdiction from a Supreme Court and revest it with such jurisdiction as a Federal Court. But a different principle applies to the further doctrine laid down by the High Court,[2] that in the exercise of such jurisdiction it could exclude a right of appeal save by special leave to the Privy Council. It was not contended on behalf of the High Court that the Parliament could create a subordinate Court and bar an appeal to the Privy Council by special leave, and it was argued that they had not attempted to do so, but had merely provided that there should be no appeal without special leave. But this view was clearly not that adopted by the Privy Council,[3]

[1] (1905) V. L. R. 463. Contrast Clark, op. cit., p. 160.

[2] *Hannah* v. *Dalgarno*, 1 C. L. R. 1, at p. 10; *Baxter* v. *Commissioners of Taxation, N. S. W.*, 4 C. L. R. 1087, at pp. 1138, 1139, Higgins J. dissenting, at pp. 1162, 1163.

[3] [1907] A. C. 81. Cf. Harrison Moore, op. cit., p. 231.

which evidently held that though the jurisdiction conferred was federal, and the authority federal, the fact could make no difference to the terms of the Orders in Council granting the right to appeal on certain conditions. The view of the High Court was somewhat later voiced again by Mr. Deakin in 1910 in a dispatch to the Secretary of State,[1] in which he suggested that the Orders in Council regulating appeals to the High Courts of the states should only deal with non-federal jurisdiction. The Colonial Office in a letter to the Privy Council Office pointed out that this would be contrary to the decision of the Privy Council in *Webb* v. *Outtrim*, and Orders in Council have already been issued for all the States which make no difference in the character of the jurisdiction to which the Orders apply.

In another form the same question crops up in connexion with the problem of the provision in the Constitution which prevents the High Court being deprived by the Parliament of its power to hear any case from which an appeal lay from a Supreme Court to the Queen in Council at the time of the passing of the Act of 1900. It was suggested in the judgement of the High Court in *Hannah* v. *Dalgarno*,[2] that if the federal jurisdiction conferred by the Federal Parliament were a new jurisdiction, then an appeal would not have lain at the establishment of the Commonwealth, and therefore Parliament could limit the right of a hearing in such cases. The argument is apparently wrong, and in any case it is academic, for Parliament is not likely to diminish the appellate power of the High Court.

The High Court has decided to follow the doctrine laid down by the Privy Council in certain cases and to refuse to exercise its power of hearing appeals in cases of election petitions, where the matter is clearly one in which the State Court intervenes as a substitute for the older method of allowing the House to try its own petitions, and where the usual principles of appellate jurisdiction are out of place.[3]

[1] See *Parl. Pap.*, Cd. 5273, pp. 39, 40. Cf. Quick and Garran, op. cit., p. 755.

[2] 1 C. L. R. 1, at pp. 9, 10.

[3] *Holmes* v. *Angwin*, (1906) 4 C. L. R. 297; see *Théberge* v. *Landry*, (1871) 2 App. Cas. 102; *Valin* v. *Langlois*, (1879) 5 App. Cas. 115; *Kennedy*

The question of appeals to the Privy Council from the Commonwealth and the State Courts will be dealt with below. As part of the settlement of that question, Act No. 8 of 1907 has deprived the State Supreme Courts of any jurisdiction whatever in cases where no appeal lies save by leave of the High Court to the Crown in Council,[1] that is, cases involving the constitutional rights of the states *inter se*, or of the Commonwealth and a state or states, thus preventing a direct appeal to the Privy Council from the Supreme Courts in these questions.

What constitutes such a case is of course difficult to determine. In *Lee Fay* v. *Vincent*[2] the High Court held that that case, which involved the question of discrimination in Western Australia on the ground of residence against inhabitants of another state (namely in not permitting by the *Factories Act*, 1904, the employment of Chinese in a factory if not employed there before November 1, 1903), was not within the meaning of s. 5 of the *Judiciary Act*, 1907, and could not be tried in the High Court save upon appeal from the Supreme Court to which it was remitted. In *Fox* v. *Robbins*,[3] which concerned the validity of the requirement in Western Australia of a larger licence fee in respect of the sale of wine manufactured from fruit grown in another state than of wine from home-grown fruit, the Court also held that s. 5 did not apply, and confirmed the dismissal by the magistrate of the charge.

In the case of *Hogan* v. *Ochiltree*[4] the High Court, in August 1909, on appeal from the Supreme Court of New South

v. *Purcell*, (1888) 14 S. C. R. 453; 59 L. T. 279. Cf. also *Parkin* v. *James*, 2 C. L. R. 315, at p. 333. It should be noted that the High Court follows generally the principles adopted in matters of appeal by the Privy Council, e. g. as to the grant of special leave, &c. See e. g. *Baxter* v. *New South Wales Clickers' Association*, 10 C. L. R. 110; *Musgrove* v. *Macdonald*, (1905) 3 C. L. R. 132; *Brisbane Shipwrights' Union* v. *Heggie*, (1906) 3 C. L. R. 686; *Saunders* v. *Borthistle*, 1 C. L. R. 379; *Mitchell* v. *Brown*, 10 C. L. R. 456; *Schiffmann* v. *The King*, 11 C. L. R. 255; see also Keith, *Journ. Soc. Comp. Leg.*, xi. 220–8.

[1] 63 & 64 Vict. c. 12, Const. s. 74; Harrison Moore, op. cit., pp. 236 seq.

[2] 7 C. L. R. 389.

[3] 8 C. L. R. 115.

[4] 10 C. L. R. 535. Contrast Quick and Garran, op. cit., p. 722.

Wales, had held that the plaintiff had no title to occupy the land in respect of which an action was brought in the previous June. The Legislature of New South Wales in June 1909 subsequently passed an Act declaring in effect that the plaintiff should be deemed to have a title to occupy the lands in question at that date. In February 1910 a motion was made in the Court of New South Wales for decree in the suit, and the Chief Judge in Equity delivered judgement on the construction of the Act, holding that it was retrospective and bound the lands, but the further point was taken by counsel for the defendant that the Act was invalid, as being in conflict with the decision of the High Court in the case of *Minister for Lands (N. S. W.)* v. *Bank of New South Wales*,[1] in which it was held by the High Court that the plaintiff had no title to the lands in question, and thus arose a question of the limits *inter se* of the power of the Commonwealth and the states within the meaning of s. 40 (*a*) of the *Judiciary Act*, 1903. The Chief Judge then held that the question of the validity of the Act must be referred to the High Court, and the suit was removed accordingly. It was argued for the defendant that the state legislation was in fact a direct interference with the judicial functions of the High Court. The judgement of the High Court gave the defendant a right which the Legislature could not retrospectively take away.

The High Court unanimously agreed that no question was raised of the powers *inter se* of the Commonwealth and the states. The decision of the High Court remained untouched. It was now the law, declared by a subsequent statute, that the plaintiff then acquired a retrospective title to the land. The propriety of his doing so was a question entirely between the Legislature and the constituencies, and no question of the interpretation of the Constitution arose.

The High Court has decided that the Supreme Courts of the states, in the execution of the judgements of the High Court reversing their decisions, are not able to allow either a stay[2] or an adjournment,[3] though appeals to the Privy Council

[1] 9 C. L. R. 322. [2] *Peacock* v. *Osborne*, (1907) 4 C. L. R. 1564.
[3] *Bayne* v. *Blake*, (1908) 5 C. L. R. 497.

be pending. They admitted that the State Courts and their officers were not officers of the High Court, but they reminded the Chief Justice of Victoria and the officers of the Court that they were Australians, bound by the laws of the Commonwealth under s. 5 of the Constitution Act.

In 1910 the Commonwealth Parliament by Act No. 34 authorized the Governor-General to refer to the full bench of the High Court for hearing and determination any question of law as to the validity of any Commonwealth Act.[1] Any state interested shall be allowed to intervene,[2] and any person interested may be permitted to appear at the hearing, and the Court is authorized to secure the argument by counsel at the expense of the Commonwealth of any point which they think should be so argued. The determination of the Court upon the matter shall be final and conclusive, and not subject to any appeal, but this provision of course does not bar the prerogative right to grant leave to appeal under s. 74 of the Constitution. The legislation is based on the model of that adopted by Canada in the Supreme Court and also by the Canadian Provinces, but differs from the legislation in the case of the Supreme Court by making the decision final, and not merely as in the case of Canada, consultative.

Under s. 118 full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every state.[3] This clause is borrowed from the United States Constitution, and fortunately its sense there has received judicial interpretation in a manner which the Courts of Australia are no doubt sure

[1] Sir J. Quick was doubtful as to the propriety in point of law of the enactment, but approved its expediency; see Quick and Garran, op. cit., p. 767; *Parliamentary Debates*, 1910, pp. 6489 seq., 6781 seq.; Harrison Moore, op. cit., pp. 363 seq.

[2] This has been done already in several cases under the existing law; e.g. *The State Railway Servants' Case*, 4 C. L. R. 488; *The King* v. *Barger*, 6 C. L. R. 41; *Baxter* v. *Commissioners of Taxation, N. S. W.*, 4 C. L. R. 1087; *The Woodworkers' Case*, 8 C. L. R. 465, and by the Privy Council in the case of the Commonwealth; *Webb* v. *Outtrim*, [1907] A. C. 81.

[3] For Canada, cf. *Cooper* v. *Cooper*, 13 App. Cas. 88; *Logan* v. *Lee*, 39 S. C. R. 311.

to follow, and which robs the provision of any serious objection. Briefly, the effect of it is to secure the due recognition of the modern rules of private international law, especially with regard to the judicial proceedings. It does not even go so far as to allow one decision to be enforced by the Courts of another state, but it does extend to making another state's Courts treat the decision as a correct exposition of the laws of that state ; it deals in fact with procedure rather than with substantive law. For example, the case of *Haddock* v. *Haddock*[1] decided that a divorce valid in one state was not, under that clause of the Constitution, *eo nomine* valid in another ; that depended on the further question whether the Courts of the first state had jurisdiction, that is, whether the persons divorced were domiciled there, that being the rule of private international law as understood in America by the Supreme Court. The Commonwealth Parliament, following the model of the Australasian Federal Council,[2] has power to legislate on the topics of the service of criminal and civil process throughout the Commonwealth and of the recognition of state laws therein, and the power has been exercised by the *State Laws and Records Recognition Act*, 1901, and the *Service and Execution of Process Act* of the same year. Part iii of the latter Act provides for the endorsing of warrants in other states and the arrest of the fugitive offender, who may be discharged by a justice if the complaint is trivial, or apparently not bona fide,[3] but otherwise is sent back. This power is concurrent with the powers given by part ii of the Imperial *Fugitive Offenders Act*, 1881, which has been applied to Australia.

Part iv creates an interesting problem, for it allows the Courts of the states to have their judgements enforced by mere registration in the Courts of other states. This may, of course, give a curious effect in that a judgement which,

[1] (1905) 201 U. S. 562.

[2] See Harrison Moore, op. cit., pp. 477 seq. ; Quick and Garran, op. cit., pp. 614–6 ; *Elkan* v. *de la Juvenay*, 22 A. L. T. 34.

[3] *The King* v. *Boyce and Roberts, ex parte Rustichelli*, (1904) S. R. (Qd.) 181. An attachment for failure to carry out a judgement cannot be enforced elsewhere ; *Lewis* v. *Lewis*, (1902) S. R. (Qd.) 115.

if rendered before federation, would not have founded even a valid action in another state, may be registered, and acted on now, though, according to the rules of private international law as laid down by the English Courts and the Privy Council, the action was not one which the Court could properly entertain. No case has yet been decided on this point, but Professor Harrison Moore [1] seems right in holding that this is the result, as apparently it is in England in the case of Scottish judgements contemplated in the *Judgements Extension Act*, 1868.

It is convenient here to notice the limits which bound the power of the executive to establish tribunals other than the Courts to deal with matters of a quasi-judicial character. The establishment of such authorities has always been jealously regarded by the Courts of law, and they will, as has been established in a series of recent British cases, scrutinize very closely the acts of such tribunals to ascertain if they are within the powers accorded, and if in the exercise the authority has acted properly according to the powers—for example, has heard evidence and has applied the proper principles to considering the facts so found ; the Courts will not, of course, usurp a right to decide the matters which are by law removed from their ken, but will see that the authority constituted acts on the principles which bind it. But subject to the control of the Courts the decisions of such bodies are clearly judicial, and differ from executive Acts in their binding force. On the other hand, there are cases of inquiries which, though apparently in form judicial, are not really such at all. This is dealt with in the decision of the Supreme Court of New Zealand in the case of *Cock* v. *Attorney-General and another*,[2] decided in 1909. It was held

[1] Op. cit., p. 484 ; cf. Dicey, *Conflict of Laws*,[2] p. 426. The opposite doctrine has been accepted in *Mackenzie* v. *Maxwell*, (1903) 20 W. N. (N. S. W.) 18, by Pringle J. Cf., however, *ex parte Penglase*, (1903) 3 S. R. (N. S. W.) 680. Harrison Moore's view is adopted in *Adcock* v. *Aarons*, 5 W. A. L. R. 140.

[2] (1909) 28 N. Z. L. R. 405. See also Clark, op. cit., pp. 222–53, for a Tasmanian case in 1892.

in that case, in accordance with the views of certain lawyers in connexion with the Municipal Corporations Commission,[1] that an inquiry instituted by the Crown to ascertain if an offence has been committed, and by whom, and whether any penalty or forfeiture has been incurred, is a matter trespassing on the province of the judiciary and within the mischief of the statutes 42 Edw. III. c. 3 and the Act for the abolition of the Star Chamber.[2]

The question of inquiries has also been considered by the Supreme Court of New South Wales in the case of *Clough* v. *Leahy*.[3] In that case a royal commission had been issued to inquire into the formation, working, and constitution of a certain industrial union, to consider if it were an invasion of two Acts of Parliament, whether it hampered the Industrial Arbitration Court from doing justice in disputes arising in the pastoral industry, and whether any alteration of the law was necessary in this connexion. On the prosecution of a witness for refusing to give evidence, it was argued before the Court that the object of the commission being solely to inquire into matters already adjudicated upon by the Arbitration Court, and over which that Court had complete power, the royal commission as a usurpation of the jurisdiction of a Court lawfully constituted to deal with the same matter was illegal. This view was accepted by the Supreme Court, but on appeal it was held by the High Court of Australia that there was no warrant for saying that any inquiry of itself was unlawful, even though it related to guilt or innocence or to private right and was held in public. It was clearly the opinion of the Court that the mere inquiry into guilt or innocence, even when backed by a power to compel evidence, was not a judicial proceeding or a usurpation of judicial power.

In the case of *Huddart Parker & Co. Proprietary Limited* v. *Moorehead*[4] it was held unanimously by the whole Court that

[1] Harrison Moore, *Commonwealth of Australia*,[2] p. 310, n. 1; *Parl. Pap.*, 1852, xxvi. 331 seq.; *Law Review*, xv. 269. [2] 16 Car. I. c. 10.

[3] (1904) 2 C. L. R. 139, overruling (1904) 4 S. R. (N. S. W.) 401.

[4] 8 C. L. R. 330, at pp. 354 seq., per Griffith C.J.; at pp. 366 seq.,

the power given by the *Australian Industries Preservation Act*, 1906, as amended in 1907, to the Controller-General of Customs to demand under penalties replies to questions, when he believed that there existed any conspiracy to monopolize trade, &c., was valid, and that it was not an exercise of judicial power requiring the presence of a jury. The powers granted were no more than were necessary and useful for the purpose of administration of the Acts, and had other parallels in powers given to officers by the *Audit Act*, 1901, *Immigration Restriction Act*, 1905, and *Census and Statistics Act*, 1905. Isaacs J. put it that the inquiry was merely to inform the mind of the executive whether the law has or has not been observed, and if not, whether the nature of the contravention was such as to merit further action. On the other hand, O'Connor J. clearly laid it down that the power of inquiry must not be used if legal proceedings were on foot, and if used the Court would restrain such use.

An interesting and important question arises in the case of the Commonwealth inasmuch as the judicial power is vested in Courts, defined by the Constitution. It is suggested by Professor Harrison Moore [1] that the result of this enactment is to deprive the Parliament of any power to deal with matters which are judicial by means other than those of the Courts, and he deduces from the *Huddart Parker* case that while the Parliament could provide that certain matters could be inquired into by the Controller-General of Customs it could not empower the Controller to impose fines. Nor again, he urges, could the Parliament pass an *ex post facto* law making criminal acts which when done were lawful, though not every retrospective act is an act of this prohibited class.[2]

per Barton J.; at pp. 377 seq., per O'Connor J.; at pp. 381 seq., per Isaacs J.; at p. 418, per Higgins J. *Cox* v. *Coleridge*, 1 B. & C. 37, was much relied on by the Court.

[1] Op. cit., pp. 95 seq., 313 seq.; cf. Clark, *Australian Constitutional Law*, pp. 36–41; Quick and Garran, op. cit., pp. 720–2. In Canada there is no provision for judicial powers being separate from legislative, and the doctrine has not been applied; see Lefroy, *Legislative Power in Canada*, pp. lvi, 124, 279.

[2] Cf. *Donohoe* v. *Britz*, (1904) 1 C. L. R. 391, at p. 402.

It may be that these principles will be upheld by the High Court, but it is certainly doubtful if they can be regarded as valid.

It may be added that, from the parliamentary point of view, exception has been strongly taken to judicial inquiries into matters which lie within the sphere of the action of Parliament. Thus in 1873, when the attempt by the Government of Canada to set up a select committee with power to examine witnesses on oath in connexion with the Pacific Railway scandals broke down owing to the disallowance of the Act conferring upon the committees the power in question, as being repugnant to the limitations on the privileges of Parliament imposed by the *British North America Act*, 1867, a royal commission of three judges was set up by the Government. To the royal commission very strong exception was taken by Mr. Seth Huntingdon, the Liberal member who in April 1873 had demanded the inquiry into the charges he adduced against the Government of Sir John Macdonald, and he declined to give evidence before the commission or aid them in any way, on the ground that the issue of the royal commission was an improper interference with the privileges of Parliament.[1]

The same question was hotly discussed in 1910 in Western Australia, when the Government, as a result of attacks on the Lands Department, set up a commission of inquiry. It was protested by the Opposition that this was a flagrant violation of the freedom of parliamentary discussion, and an abrogation of the responsibility of ministers for parliamentary criticism. It was pointed out that the powers given by the Act of 1902 would enable the commissioners to call upon the members of the House to give evidence under penalty, and that such action logically was a denial of the privilege of free speech. Stress was laid on the English precedents, and especially on the case of the Act of 1888 for the setting up of the Parnell Commission. That Act was, it was asserted, a very improper use of the legislative power, but it was a recognition of the fact that royal commissions could not

[1] *Parl. Pap.*, C. 911, pp. 77 seq., 87, 90.

be employed on such occasions without direct statutory authority. The Government, however, maintained that there would be no invasion of Parliamentary privilege ; they merely afforded a really effective means of testing the accusations made in Parliament by the Opposition ; and they persisted in the course proposed, with the result that the commissioners rebutted the charges, but the Opposition refrained from pressing them by giving evidence.[1]

It may be added that the power to legislate as to the judicial power of the Commonwealth does not enable the Parliament to confer rights on the High Court which are not valid exercises of purely judicial functions. Thus the proposal to convert the High Court into a Criminal Court of Appeal, with all the powers exercised by the English Criminal Appeal Court, although ably defended in the Senate by its promoter, the late Senator Neild, never got beyond that House, in view of the grave constitutional questions its enactment would have raised.[2]

§ 7. Finance and Trade

The revenues of the Commonwealth are constituted into a consolidated fund charged with the expenses of collection and then with the Commonwealth expenditure. No appropriation can be drawn from the Treasury except under a law, but the Governor-General in Council was authorized to draw from it until a month after the first meeting of Parliament moneys to defray the cost of administration and the expenses of an election. Provision was also made for the transfer of officers to the Commonwealth with the transferred department, and for the payment to them on retirement of pensions if the service had been in the state to the end, but requiring the state to pay a proportion of the salaries awarded. State officers not retained in the service were to receive the same pension as if they had been retired on abolition of office, the payment to be defrayed by the state. Any officer transferred from a state service to a Commonwealth service should receive

[1] *Parliamentary Debates*, 1910–1, pp. 1502–51.

[2] Cf. Turner, *Australian Commonwealth*, p. 240.

such pension on ultimate retirement as he would have received under the law of the state. These provisions have, curiously enough, given rise to a considerable amount of unnecessary litigation, partly caused by the unwillingness of the states to pay their share of the retiring allowances of certain officers [1] or the reduction of their former salaries by the Commonwealth.[2]

The provisions as to the transfer of state property are as follows :—

85. When any department of the public service of a State is transferred to the Commonwealth—

(i) All property of the state of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth ; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary :

(ii) The Commonwealth may acquire any property of the state, of any kind used, but not exclusively used in connexion with the department ; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the state for public purposes is ascertained under the law of the state in force at the establishment of the Commonwealth :

(iii) The Commonwealth shall compensate the state for the value of any property passing to the Commonwealth under this section ; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament :

(iv) The Commonwealth shall, at the date of the transfer, assume the current obligations of the state in respect of the department transferred.

Much property has been transferred under this agreement to the Commonwealth, but the payments to be made are

[1] Cf. *Willis* v. *Machray*, [1910] A. C. 476 ; *New South Wales* v. *Commonwealth*, 6 C. L. R. 214 ; *Manton* v. *Williams*, 4 C. L. R. 1046 ; *Greville* v. *Williams*, 4 C. L. R. 694 (reversed on different grounds by Privy Council, 8 C. L. R. 760) ; *Dettman* v. *Williams*, 3 C. L. R. 43, &c.

[2] Cf. *Cousins* v. *Commonwealth*, 3 C. L. R. 529 ; cf. *Bond* v. *Commonwealth*, 1 C. L. R. 13.

far from yet being finally settled in 1911, and it was proposed that they should be set off against the amount of the state debt if and when the Commonwealth decides to take over the debts which it now can do at any time to their full extent under the Act No. 3 of 1910.[1] The states are, however, now demanding payment forthwith with 3½ per cent. interest.

Then follow the provisions for the question of customs and excise :—

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several states, or applied towards the payment of interest on debts of the several states taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89. Until the imposition of uniform duties of customs—

(i) The Commonwealth shall credit to each state the revenues collected therein by the Commonwealth.

(ii) The Commonwealth shall debit to each state—

(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the state to the Commonwealth ;

(*b*) The proportion of the state, according to the number of its people, in the other expenditure of the Commonwealth.

(iii) The Commonwealth shall pay to each state month by month the balance (if any) in favour of the state.

[1] Cf. Harrison Moore, op. cit., pp. 528–48 ; Mr. T. G. Watson's *Notes on the Financial Problems of the Commonwealth and the States* in Victoria *Parl. Pap.*, 1907, No. 5. The cost of federation is given in Commonwealth *Parl. Pap.*, 1910, No. 62, and a paper on the comparative cost to the lesser states in Tasmania *Parl. Pap.*, 1910, No. 50.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several states imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any state shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a state from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.[1]

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any state, or into any Colony which, whilst the goods remain therein, becomes a state, shall, on thence passing into another state within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides—

(i) The duties of customs chargeable on goods imported into a state and afterwards passing into another state for consumption, and the duties of excise paid on goods produced or manufactured in a state and afterwards passing into another state for consumption, shall be taken to have been collected not in the former but in the latter state ;

(ii) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to

[1] Cf. *Fox* v. *Robbins*, (1909) 8 C. L. R. 115 ; Harrison Moore, op. cit., pp. 342–4, 564–72 ; *in re Australasian Automatic Weighing Machine*, (1905) 1 Tas. L. R. 113.

the several states as prescribed for the period preceding the imposition of uniform duties of customs.[1]

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several states of all surplus revenue of the Commonwealth.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that state be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that state and not originally imported from beyond the limits of the Commonwealth ; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any state.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one state or any part thereof over another state or any part thereof.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a state or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Nothing has caused more unending discussion than the clause 87, ' the Braddon blot '. It was a compromise, and

[1] Cf. on this, *State of Tasmania* v. *Commonwealth and State of Victoria*, 1 C. L. R. 329. Tasmania consistently loses revenue by its proximity to Victoria and New South Wales, and the impossibility of calculating on what goods duty should really be paid.

no one was very enthusiastic about it, for it compelled the Federal Government to raise four times the revenue which it wanted for the purpose of raising a federal revenue of any size, since the other most important revenue-producing measure was the postal revenue. But the real resistance grew strong when it was decided in 1908, on the expiration of the book-keeping system, to alter the purely cash system of accounts established by the Constitution. The *Audit Act*, 1906, had authorized the establishment of trust accounts by the treasurer to which should be carried all moneys appropriated to the purposes thereof by Parliament. The *Surplus Revenue Act*, 1908, s. 4 (4) (d), now provided that all payments to trust funds established under the *Audit Act*, 1901–1906, of moneys appropriated by law for any purpose of the Commonwealth should be deemed to be expenditure, and that any such appropriation should not lapse at the end of the financial year for the service of which it was made. In other words, the system was no longer to be followed of debiting the states with the actual expenditure, but with the amount of expenditure which the Parliament had authorized. Moreover, the Parliament authorized the accumulation of funds in respect of services to be undertaken in subsequent years. The new proposal was bitterly attacked in Parliament as contrary to the Constitution; it was urged[1] that the device was illegitimate, that the states were entitled to everything not actually expended, that appropriation was not expenditure, and that nothing by the usage of Parliament could be deemed to be expenditure if it were not voted by Parliament for the actual service of the year. Moreover, it was urged that a direction that money be carried to a trust account was not even in a parliamentary sense appropriation, since it did not make the money available for handling by the Executive Government. The provision in question could be used to nullify the constitutional right of the states to surplus revenue by allowing the Commonwealth to put aside whatever it wanted, nominally for

[1] Commonwealth *Parliamentary Debates*, 1908, pp. 11810 seq. (Mr. Bruce Smith), 11833 seq. (Mr. Reid). Cf. Quick and Garran, p. 825.

future expenditure but really as a hoard. On the side of the Government [1] it was replied that the system was perfectly legitimate, and that any other would merely be a continuation beyond the appropriate time of the old system of book-keeping, and would prevent Parliament making any adequate provision for the necessities which were plainly looming before it.

The matter was raised in the Courts by the Government of New South Wales in connexion with appropriations thus made to the credit of trust funds for defence and harbours, which were not intended to be expended in the year. New South Wales claimed that this was wrong and diminished unfairly the balance due to the state: the High Court [2] was quite clear that the Constitution permitted the Commonwealth to debit against the states all appropriations made by the Parliament lawfully, whether money had been disbursed on the ground of such appropriation or not, and whether the authority to disburse was one on which the Executive could act in that year or not. It was clear that they considered that the Commonwealth Government had gone to needless trouble in this creation of trust funds.[3]

The question of the Braddon clause became more and more important as the time drew near when its operation would determine. It was felt that to leave the states at the mercy of the Commonwealth would never do, and various schemes were mooted at the eleven conferences which took place between 1901 and 1909 between the state ministers and on some occasions Commonwealth ministers. It was proposed by Sir George Turner, in 1904,[4] in reply to a resolution of the State Premiers adopted in 1904 at Sydney, to take over the state debts, in return for the right to use the surplus revenue and the retention of the gross railway

[1] Commonwealth *Parliamentary Debates*, 1908, pp. 11798 (Mr. Glynn), 11814 (Mr. Irvine). [2] 7 C. L. R. 179.

[3] Cf. the same question discussed in Queensland *Parliamentary Debates*, 1910, pp. 1463 seq., in connexion with the question of the legitimacy of a transfer of £50,000 to a trust fund for the University.

[4] Victoria *Parl. Pap.*, 1904, No. 37.

revenue, which was to cover the difference between the excess of interest on the debts and the surplus revenue due to the states. This plan was not acceptable to the states, which were reluctant to give up the revenue from the railways, and one of them, New South Wales, was not anxious for the taking over of the debts at all. At the Premiers' Conference at Hobart, in 1905, a new line was adopted, the proposal being merely to secure the future of the states by removing the time-limit of the Braddon clause.[1] A conference in April 1906,[2] at Sydney, led to the rejection of a scheme, suggested by Sir John Forrest, for the payment to the states for a definite time of a definite sum based on the receipts from customs and excise in past years, but a conference in Melbourne in October of that year seemed to bring the parties near to agreement. It was then agreed by the states to accept a proposal of Sir John Forrest to pay to each for ten years and until further alteration of the Constitution a sum equal to the three-quarters of the customs and excise revenue contributed by it for the ten years preceding December 31, 1910. If in any event three-quarters of the customs and excise revenue exceeded the guaranteed amount the excess should be distributed on a *per capita* basis. On the other hand, the Commonwealth could impose new duties for a specific purpose without returning anything to the states, and a subsequent conference of May 1907 added to that the power of increasing existing duties for such a purpose. At that conference also the arrangement was to be alterable after ten years by a simple Act. It was estimated that under this scheme there would be due to the states in 1910–11 £8,041,000. The treasurer's scheme for a gradual conversion of the state debts and applying the surplus payments in interest was approved, but the details were not worked out pending the decision on the Braddon clause.[3]

The whole project fell through with the resignation of Sir John Forrest, and Sir W. Lyne in April 1908 proposed

[1] Victoria *Parl. Pap.*, 1905, No. 29. [2] Ibid., 1906, No. 23.
[3] Commonwealth *Parl. Pap.*, 1907–8, Nos. 2, 13.

further conditions in favour of an early taking over of debt and the creation of a Council of Finance which should control a sinking fund and decide as to new loan issues, whether for state or Commonwealth. Parliament was to appropriate annually the amount required to pay interest and charges on the debt, £8,753,000. The Commonwealth would be recouped out of surplus revenue plus any additional payment necessary, diminishing after five years according to a sliding scale, and ceasing altogether in thirty years. A state which made default was to be liable to a tax, on a certificate of the Council of Finance, and the Council could suspend its powers of borrowing for ten years. At the same time the states were to hand over gratis the transferred properties. The first payments were to be £2,753,000, and the surplus revenue credited, which at first would be £6,000,000, would have been raised to £6,568,000 in 1920–1, and when in thirty years the debts were extinguished the Commonwealth would in effect be paying the whole £8,753,000 a year. This scheme had the obvious merit of settling and separating the revenues of the two bodies, but the states complained that it deprived them of future increases of revenue from customs and excise, and said they must have a fixed annual sum and a proportionate part of all increases of revenue.[1] In March 1909[2] the conference reassembled at Hobart, when Mr. Fisher attended but made no proposal. It was then suggested that the Commonwealth should return three-fifths only of the revenues from customs and excise, with a minimum of £6,750,000, and the arrangement was to be perpetual, and not to be altered without an amendment of the Constitution. The distribution was to be on a *per capita* basis with a special allowance of £250,000 a year to Western Australia, to diminish by £10,000 a year. Mr. Fisher referred to his proposal in his political speech at Gympie in March 1909,[3] when he pointed out that the surplus revenue thus placed at the disposal of the Commonwealth would be only £1,313,000, which was inadequate to

[1] Commonwealth *Parliamentary Papers*, 1908, No. 44.

[2] Ibid., 1909, No. 48. See also Nos. 23, 44, 50. [3] *Argus*, March 31, 1909.

meet an additional expenditure then calculated at nearly £3,000,000, and the plan of raising £5 to obtain £2 was absurd. He suggested that in future the Braddon clause should be abolished and the surplus revenue returned: he was prepared to guarantee £5,000,000 and £250,000 for Western Australia. This was based on five years' returns of the customs and excise less the average expenditure on non-productive services, plus £2,000,000 for old age pensions and £1,000,000 for other services; the distribution would be *per capita* and would work out at £1·205 of the population.

The defeat of Mr. Fisher in June 1909 resulted in the return of Sir John Forrest to the position of treasurer, and in August a conference was held at which a final agreement was reached under which the states should receive £25 per head of the population with an extra allowance of £250,000 for Western Australia, diminishing by £10,000 a year the allowance to be provided by the other states on a population basis. It was agreed that the arrangement should be placed on a firm basis by making it a part of the Constitution, and the Bill for this purpose actually managed to get through the Senate, though everything turned on how Mr. Irvine and others would vote in respect of the unpopular attempt to make it permanent. It was rejected, however, by three states out of six at the referendum in 1910,[1] but happily it was passed as a simple Act in the same year, No. 8 of 1910, simplifying the position of finances im-

[1] Namely New South Wales, Victoria, and South Australia against, the others for, and a total of over 25,000 against in all. The voting was: New South Wales, 227,650 for, 253,107 against; Victoria, 200,165 and 242,119; Queensland, 87,130 and 72,516; South Australia, 49,352 and 51,250; Western Australia, 49,050 and 30,392; Tasmania, 32,167 and 21,454: being totals of 645,514 to 670,838. 82,437 papers were informal; 28·58 of the electorate voted for, 29·70 against; see Commonwealth *Parliamentary Papers*, 1910, No. 1, p. 20. In the case of the State Debts referendum the results were: New South Wales, 159,275 for, 318,412 against; Victoria, 279,392 and 153,148; Queensland, 102,705 and 56,346; South Australia, 72,985 and 26,742; Western Australia, 57,367 and 21,437; Tasmania, 43,329 and 10,186. Total, 715 053 for, 586,271 against; 31·66 for, 25·96 against; 96,209 papers were informal.

measurably. Only one point marred the harmony of the settlement. The Government in effect made the new arrangement take place from July 1, 1910, though the Braddon clause was in force until December 31, 1910, by enacting that if under this clause more than 10*s.* 6*d.* a head is paid in the first half year there would be proportionate deductions in the next half year, and in fact there were very large overpayments in the first six months.

It is open to the Commonwealth, under s. 96 of the Constitution, to grant financial assistance to any state on such conditions as it may think fit, but no step has yet been taken to carry out this policy,[1] which is an exception to the general rule in s. 99, that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one state or any part thereof over another state or any part thereof. This latter provision was considered by the majority of the High Court to be one of the grounds on which the Commonwealth *Excise Act*, 1906, regarding the manufacture of agricultural instruments could successfully be impeached, in that it provided that those manufacturers should be exempt who manufactured under labour conditions approved by one or other of several authorities including state Courts and wages boards, and they held that thus a different set of conditions would be set up all over Australia. It was held, on the other hand, by the minority of the Court that there was no discrimination between states or parts of states, unless the discrimination were because *A* was a part or the whole of one state and *B* part or the whole of another state; that is, that the discrimination must be because of the state character, and this seems the sounder view of a proposition which is beyond question doubtful and difficult.[2]

The Commonwealth cannot by s. 100, by any law or regulation of trade, abridge the right of a state or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation—an important law, for water rights in

[1] Cf. Clark, op. cit., pp. 212–8.

[2] *The King* v. *Barger*, 6 C. L. R. 41.

the Murray have formed the subject of repeated and futile attempts by Victoria, New South Wales, and South Australia to arrive at some scheme which will secure the proper utilization of the waters of the river without depriving the lower stream of its navigable character. The whole question may ultimately be laid before the High Court.[1]

For the purpose of the adjustment of the provisions of the Constitution relating to trade and commerce and the laws made under the power in the Constitution, the Parliament was authorized to set up an Inter-State Commission.[2] This commission was necessary if Parliament were to exercise the power given in s. 102 to forbid by any law with respect to trade and commerce as to railways any preference or discrimination by a state, or an authority constituted under the authority of a state, if the preference or discrimination were undue and unreasonable and unjust to any state, due regard being had to the financial responsibilities incurred by the state which had provided the railway, but no preference or discrimination should be deemed to be undue unless determined to be so by the Inter-State Commission. The members of the body were to be appointed by the Governor-General in Council and hold office for seven years, but be removable on address from both Houses of Parliament in the same session, on the ground of proved misbehaviour or incapacity; they were to receive salaries fixed by Parliament and not to be diminished during their tenure of office. At the same time, with a view to the exceptional case of such places as South and Western Australia, it was provided in s. 104 that nothing should prevent the levying of any rate for the carriage of goods on a state railway, if the commission certified that the rate was necessary for the development of the state, provided that such rates applied equally to goods within the state and

[1] Cf. Clark, op. cit., pp. 102–17. A new agreement (South Australia *Parl. Pap.*, 1911, No. 37) is to be submitted to the Parliaments in 1911.

[2] Ibid., pp. 185–9; Harrison Moore, op. cit., pp. 573–6. That no other executive authority could be set up was argued in *Huddart Parker and Co. Proprietary Ltd.* v. *Moorehead*, (1909) 8 C. L. R. 330, but that was not accepted by the High Court.

goods coming in from without, thus obviating those differential rates of which Queensland complained so bitterly in the *Railway Border Tax Act*, 1893.

No steps have ever been taken to set this commission on foot. It was, however, proposed by Mr. Deakin in his policy of conciliation with the states, which dominated the session of 1909 in preparation for the general election in 1910, that the Commission should be used to assist in a settlement of the very vexed question of the industrial regulation by the Commonwealth. It was proposed that the Commission should have power to interfere when, by the determination of the authorities on such subjects in one state, in another state matters should be unfairly affected—for example, if in New South Wales the wages in one trade were fixed at nine shillings a day, and if the same trade in Victoria paid only eight shillings a day, the Commission would have had power to increase the rate in Victoria to such a figure as corresponded in the circumstances with the New South Wales figure; but this proposal never became law, and the general election of 1910 brought in a party determined to arrange matters by a more energetic propaganda.[1]

S. 105 allowed the Commonwealth to take over the debts of the states as existing at the establishment of the Commonwealth, or a proportionate part according to population, and to convert, renew, or consolidate such debts or part thereof, and the states were to indemnify the Commonwealth for the interest payable in respect of the debts, the sums due being deducted from the amounts payable as surplus revenue, or if there were no surplus revenue, or if it were insufficient, the whole amount to be made good by the state. This clause has figured in all the discussions for the alteration of the Braddon clause, and in 1909 it was amended to apply to all the debts of the states, and not merely those existing at federation. This amendment of the Constitution was carried everywhere, except in New South Wales, and the

[1] Harrison Moore, op. cit., p. 576, note 1; Commonwealth *Parl. Pap.*, 1909, No. 50. The defeat of the referenda has seen the proposal revived and favourably viewed by New South Wales and Victoria.

total majority was very large; it became law as Act No. 3 of 1910.[1]

There are certain limitations and qualifications of the powers of the Commonwealth with regard to the states which are set out in ss. 112–7. After the imposition of uniform duties of customs, a state may levy on imports or exports such charges as may be necessary for executing the inspection laws of the state, but the net produce of such duties shall be for the use of the Commonwealth, and any such inspection law may be annulled by the Parliament of the Commonwealth, the only case in which the Federal Parliament is permitted to render void by declaration a state Act.[2] All fermented, distilled, or other intoxicating liquids passing into any state, or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the state, as if such liquids had been produced in the state.[3] A state shall not without the consent of the Parliament of the Commonwealth raise or maintain any kind of naval force, or military force, or impose a tax or duty of any kind on property belonging to the Commonwealth, nor reciprocally can the Commonwealth impose any tax on property of any kind belonging to the state. The effect of this section has been considered in the Courts. In the case of *Municipal Council of Sydney* v. *Commonwealth*[4] it was held that the Commonwealth could not be rated on land transferred by New South Wales under ss. 85 (i) and 86 of the Constitution. The lands had paid rates while state property, and it was argued that by s. 108 the liability remained on the transfer, but the Court decided against the view, and maintained that by permitting the continuance of the tax a tax would be just as much imposed as if newly enacted. They laid it down, therefore, that s. 110 of the New South Wales Act, No. 35 of 1902, must not be claimed to be meant to apply to federal land.

[1] See p. 901, n. 1.

[2] Cf. Clark, op. cit., pp. 82, 135–8.

[3] Cf. *Fox* v. *Robbins*, (1909) 8 C. L. R. 115. This excludes the operation of the United States decision in *Leisy* v. *Hardin*, 135 U. S. 100; Harrison Moore, op. cit., p. 571.

[4] 1 C. L. R. 208.

In the case of *D'Emden* v. *Pedder*[1] it was held that the receipt given by a federal officer for his salary, such receipt being required by the law and practice of the department in which he was serving, was not the property of the Commonwealth, so that a stamp duty levied in respect of it by the Parliament of Tasmania was therefore invalid under this section. On the other hand, it was held that the prohibition on the Commonwealth to tax the property of the state did not apply to either wire netting imported by the state or even to railway material so imported, the netting being required for sale over again to farmers and the railway material for use in the state railways.[2] In the latter case also the question of the immunity of instrumentalities was raised. But the decision in both cases declined to apply the section to the cases at issue. The majority of the Court were of opinion that the tax levied in either case was a tax on the importation of goods, not a tax on property, and Isaacs J., who found himself unable to concur with this dictum, which is clearly untenable in view of the current, unbroken and convincing, of decisions in England in the contrary sense, was able to satisfy himself that the section did not intend to deal with import duties, and he instanced the practice in Canada under the similar clause in the *British North America Act*. It was indeed clear that if the principle contended for had been accepted, the result would have been that any state could by importing everything in its name prevent the Commonwealth from obtaining any customs revenue at all, and though that may be considered an extreme case, still, as a matter of fact, the actual proposal of the state Government to allow its farmers the benefits of wire netting was one which struck at the root of the stability of the finance of the Commonwealth. It was different with the case of the railway material, and one would think that a decision in the opposite sense might have been arrived at,

[1] 1 C. L. R. 91.

[2] *The King* v. *Sutton*, (1908) 5 C. L. R. 789; *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales*, (1908) 5 C. L. R. 818. This overrules (1903) 3 S. R. (N. S. W.) 115.

had there been a ground on which a distinction could conveniently have been drawn between the two cases. But that would be contrary to the Canadian rule.

The states are forbidden to coin money, or to make anything but gold or silver legal tender in payment of debts,[1] and the Commonwealth has now passed a law [2] establishing a note issue for the Commonwealth, and in effect extinguishing the rights of private banks to issue notes by imposing a 10 per cent. tax, as had already been done in Queensland, after the Australian bank failure. Moreover, arrangements have been made with the Imperial Government, under which a silver coinage has been designed for the Commonwealth, and it is manufactured in London and shipped to the Commonwealth, where it will gradually supplant the existing silver coinage, which is ordinary British money. The validity of such coinage is laid down by a Commonwealth Act of 1909, and it is valid in the Commonwealth, but of course it has no validity elsewhere unless such validity should be given by an Order in Council under the Imperial *Coinage Act*, 1870. On the other hand, in virtue of proclamations under that Act, there are branch mints in Australia, which can coin gold coins which are valid not merely in Australia, but all over the Empire where ordinary sovereigns are good tender, as in Canada, where also a branch mint has been set up at Ottawa.

On the other hand, the Commonwealth is restricted by s. 116 from making any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be imposed as a qualification for any office or public trust in the Commonwealth service. Moreover, by s. 117, the state and the Commonwealth alike are forbidden to violate the rule that a subject of the Queen resident in any state shall not be subject in any other state to any disability or disqualification which would not be equally applicable to him if he were

[1] The whole ground is covered by the Commonwealth Act No. 6 of 1909; the old Imperial Orders in Council of 1896 having been revoked retrospectively in January 1911, so that the Act has full effect.

[2] See Acts Nos. 11 and 14 of 1910.

a subject of the Queen resident in such other state. This section has not yet been found to apply to any case, though it has been invoked. But in one case[1] the test of the discrimination made was found to be domicile, not residence : in that case it was contended that the section was violated by the imposition of a specially low rate of duty on the estate of a deceased person domiciled in a state as compared with the rate on the estate of a deceased person not so domiciled, and the High Court found that the discrimination was valid, because it did not rest on residence, but on domicile, and the term residence in the Constitution could not be assumed to mean domicile, which was a very different thing from mere residence. Besides, it was pointed out that as in the case of a domiciled person the power of the state extended to taxing property wherever situate, the regulation for a lower rate was in itself a reasonable one.

§ 8. New States

By s. 121 of the Constitution the Parliament is at liberty to admit new states on such conditions as it shall prescribe, and to provide as it thinks fit for the representation in the Parliament of such states, no limit being assigned to such representation. It may also, under s. 122, make laws for the government of any territory surrendered by any state and accepted by the Commonwealth, including such representation as may be thought fit in Parliament, and the same power exists with regard to territory surrendered by the Crown to the Commonwealth. By s. 123 it is empowered, with the consent of a State Parliament, to increase or diminish the boundaries of a state, but such consent is also required from a majority of electors in the state voting on the question ; if that consent is given it also authorizes the Parliament to make provisions regarding the effect of such increase, decrease, or alteration of territory, the clause being borrowed from the Imperial Act of 1871 regarding Canada. A new

[1] *Davies and Jones* v. *The State of Western Australia*, (1904) 2 C. L. R. 29, at pp. 38, 39 ; *Lee Fay* v. *Vincent*, 7 C. L. R. 389. Cf. Harrison Moore, op. cit., p. 334 ; Stow, *Commonwealth Law Review*, iii. 97 ; *Adcock* v. *Aarons*, 5 W. A. L. R. 140, at p. 146.

state may be formed out of territory separated from a state, but the consent of the Parliament of that state is required, and a new state may be formed by the union of two or more states, but the consent of the Parliaments is needed in that case also. Moreover, a state is allowed by s. 111 to surrender a portion of its territory to the Commonwealth, and if a surrender takes place, the Commonwealth can then, under s. 122, legislate as it likes for the territory in question.[1]

The combined effect of all these provisions is a little curious. The power to admit clearly refers to cases like those of Fiji or New Zealand, which are outside the Commonwealth. The power to create a state out of territory of which the Commonwealth becomes possessed would operate of course to enable the Commonwealth to create into a state the territory of Papua, if it so deemed proper. It is curious that, as a result of the operation of s. 111, that although one state might surrender territory to the Commonwealth, the Commonwealth could only add the territory to another after both the Parliament and the electorate had agreed. It may be noted also that any change which affects a state's limits cannot be carried by an amendment of the Constitution unless the majority of electors in the state concur in the proposal.

It is a question of some difficulty whether the provisions of the Constitution have affected in any way the provisions in older Imperial Acts which authorize changes of boundary.[2] Thus by the Imperial Act of 1850[3] the Crown is empowered to change the boundaries of New South Wales and Victoria, by the Act of 1855[4] the two Colonies can alter by concurrent legislation their boundary on the Murray River, by the Act of 1861[5] any Governors of contiguous Colonies can with the advice of their Executive Councils alter the frontier, and, on

[1] This is the authority for the transfer of the Northern Territory; see below.

[2] They have clearly invalidated the application to the States of the Commonwealth of the *Colonial Boundaries Act*, 1895, and, as Quick and Garran (pp. 975, 976) point out, with very little cause.

[3] 13 & 14 Vict. c. 59, s. 30.

[4] 18 & 19 Vict. c. 54, s. 5.

[5] 24 & 25 Vict. c. 44, s. 5.

proclamation by the Crown, the frontier is so altered, while by the Constitution Act for Western Australia [1] the Crown has power to annex one portion of a Colony to another. It is certain that all these powers remained in existence up to the date of the Commonwealth, and that the provisions are by that Constitution impliedly repealed, as Professor Harrison Moore [2] suggests, seem very improbable, and in the case of demarking a contiguous boundary, he admits that there may be doubt. Indeed, in 1908 there was a proposal on foot to settle the disputed boundary between the States of South Australia and Victoria by such an agreement, which fell through because the Parliament of Victoria, being convinced that the land belonged by right to Victoria, was not prepared to pay the sum agreed upon provisionally by its Premier.

§ 9. Papua and the Northern Territory

(*a*) *Papua*

So far the only territory which has been taken over from the Crown by the Commonwealth is the territory of British New Guinea, being the portion of New Guinea which was secured by the British Government in the struggle for its possession which ensued on the over-zealous annexation by Queensland in April 1883 of the portion not claimed by the Dutch. A Protectorate was proclaimed by Commodore Erskine in November 1884 over the south-east coast and adjacent islands, and a special commissioner, Sir Peter Scratchley, was appointed in 1885, but died the same year, being appropriately succeeded by the Hon. John Douglas, formerly Premier of Queensland. At the Colonial Conference of 1887 [3] there was much discussion of the Western Pacific, and much dissatisfaction was expressed with the Imperial Government, but on that occasion the Colonial Premiers undertook to do what was clearly essential, viz. to make good the cost of governing the island, the annexation of which was clearly of no Imperial interest, and the cost of govern-

[1] 53 & 54 Vict. c. 26.

[2] Op. cit., p. 596.

[3] *Parl. Pap.*, C. 5091. See also C. 3617, 3691, 3814 (1883); 3839, 3863 (1884); 4217, 4273, 4290, 4441, 4584 (1884–5); 4656 (1886).

ing which could not with any fairness be thrown upon the Imperial tax-payer. This agreement was carried into effect by the Queensland Act of 1887 (No. 9), which guaranteed the payment of £15,000 a year towards the cost of administration, and the territory was annexed in 1888[1] by Dr. (now Sir William) Macgregor, who was appointed to administer the island. The portion annexed represented the whole of the island, deducting the portions obtained by Holland and Germany. The Imperial Government, despite its desire to be relieved of the cost of government, gave no less than £52,000 towards the cost of the administration, and the local revenue, such as it was, for a time returned *pro rata* to the contributory Colonies of New South Wales, Victoria, and Queensland.

The Government was a curious one : in form it was a pure Crown Colony Government with a constitution given by letters patent of June 8, 1888, with a Lieutenant-Governor appointed by the Crown on the advice of the Secretary of State for the Colonies, and a nominee Legislative Council, while the Executive Council was composed in the usual manner of a Crown Colony executive. But as the Colonies were paying, the rule was that the Lieutenant-Governor corresponded with the Secretary of State through the Governor of Queensland, who consulted the Government of that Colony as to the policy to be adopted. It was not surprising that with limited means little could be done in the way of developing the country. When federation took place the Commonwealth was expected to take over the territory, and as a preliminary the Governor-General was substituted for the Governor of Queensland as being in control of the Lieutenant-Governor by letters patent of March 18, 1902, which also provided for the revocation of the letters patent of 1888 whenever the Commonwealth should be prepared to take over the territory. Meanwhile the Commonwealth appropriated a sum not exceeding £20,000 a year for the cost of government of the Colony, and in 1905 at last carried the *Papua Act*, which provides for a continuance of the old form of government substituting

[1] Cf. *Parl. Pap.*, C. 5564.

the authority of an Australian Act for the Imperial letters patent. Thereupon letters patent placed the territory under the control of the Parliament of the Commonwealth. It is not a part of nor annexed to the Commonwealth, and the letters patent of the Governor-General had to be amended in 1911 to permit of his visiting Papua without being deemed to quit the Commonwealth.

It is indeed a compliment to the excellence of the letters patent for the Government of a Crown Colony that the Act simply repeats their provisions over again, substituting the Governor-General for the Queen.[1] Provision is made for the appointment of a Lieutenant-Governor, for his keeping the seal of the Colony, for his appointing and removing officers, for the grant of land, but the conditions are specified, and forbid the grant of freehold land and require reassessment of land on the unimproved value from time to time as determined by ordinance.[2] Other provisions require that licences for the sale of intoxicants cannot be increased in number, and may be abolished and diminished without any possibility of compensation. Provision is made for polls to decide as to the sale of intoxicants, and the supply of liquor to natives is forbidden except gratis for medicinal purposes for an urgent cause or necessity, the burden of proof being laid on the supplier. These are curious and odd provisions, but are due to the old rules in force before the transfer.

The Executive Council is to be appointed by the Lieutenant-Governor, and not to exceed six members, three being a quorum. The Lieutenant-Governor is to preside as a rule, and he may decide against their advice, but must then report to the minister under whose department he comes. The Legislative Council is composed of the Executive Council plus nominated members, of whom, while the population

[1] The political character of the relationship of the local and Commonwealth Governments is explained and emphasized in *Strachan* v. *The Commonwealth*, 4 C. L. R. 455, where an unsuccessful attempt was made to hold the Commonwealth Government responsible for alleged torts by the pre-Commonwealth administration.

[2] Thus the power—not normally exercised in a Colony under the letters patent—is made statutory and becomes a part of the Government.

counting whites only is under two thousand, there shall be three, with one for every complete thousand over the number of two thousand, but so as never to exceed twelve. The quorum is a third of the members. Only the Lieutenant-Governor can propose money votes. The Council has full legislative powers, but cannot impose discriminating duties on Commonwealth imports, and every Act needs the assent of the Lieutenant-Governor and may then be disallowed within six months after the assent. The Lieutenant-Governor may also reserve a Bill, and then it falls to the ground unless assented to within one year from the date of presentation to the Lieutenant-Governor for his assent. The Lieutenant-Governor is forbidden by the Act to assent to any of the following classes of Bills unless they contain a suspending clause: Bills for divorce, and for the disposal of Crown lands, Bills granting him land or money, or inconsistent with the treaty obligations of the United Kingdom or the Commonwealth, or interfering with the control or discipline of the Imperial military or naval forces, and Bills interfering with the prerogative or the rights and property of subjects of the King outside the territories, or the trade and shipping of any part of the Empire, if these Bills are of an extraordinary nature or importance. He cannot assent also to Bills dealing with native lands, or native labour, or deportation of natives, or the supply of arms, ammunition, and intoxicants to the natives, or immigration of Asiatics, African or Australian natives, or natives of the Pacific Islands, or Bills which have before been refused assent either by the Crown or by the Governor-General.[1] Further, the Commonwealth can of course make laws for the territory at pleasure, and by an unusual provision, while existing laws were continued, power was taken, in the case of all ordinances existing on the subjects which are mentioned as requiring reservation in the case of future Bills, to submit the Acts to the Governor-General, who could disallow any one within three months.

The judiciary consists of the existing Courts, which, how-

[1] If he assents, the assent is void.

ever, now are subject to appeal to the High Court instead of to the Supreme Court of Queensland, as provided in an Order in Council of 1888. The power of pardon is granted to the Lieutenant-Governor subject to the usual proviso against banishment except in the case of purely political crimes unaccompanied by any other grave crime. The revenues of the possession are to be devoted to its administration, and the Commonwealth makes grants from time to time in aid of its revenues. A sum of 10 per cent. of the lease rents is to be retained for the relief of the natives who are infirm or destitute, and vested in three trustees appointed by the Governor-General, who are required to present annual reports to Parliament. There is reserved a salary of £1,250 for the Lieutenant-Governor, and £1,000 for the Chief Judicial Officer.

The central administration, in the shape of the Minister for External Affairs, carefully controls the government of the island, and bills for creating a species of enforced labour have been refused acceptance. As a result of a commission of inquiry the Lieutenant-Governor who held office at the time of transfer took long leave and was appointed to a position of importance in the Imperial service, and after a long interregnum the Chief Judicial Officer was appointed Lieutenant-Governor, while to fill his place when he was away for any cause an Administrator has been created, who bears that title even when he is not acting, a curious device, and due to personal causes. The territory is still little administered, as the Commonwealth Parliament has not yet seen its way to vote the very large sums which would be necessary before it could be adequately developed, and of which some idea can be got by considering the large expenditure on the East African protectorates and on Uganda by the Imperial Government.[1] Very valuable reports on the territory are issued annually.

[1] Lord Howe Island is under the administration of New South Wales, since 1882 under a visiting magistrate from Sydney. Norfolk Island is administered by the Governor of New South Wales in virtue of an Order in Council under the Act 18 & 19 Vict. c. 56, s. 4. Originally he was

(*b*) *The Federal Capital*[1]

It is provided in the Constitution that the seat of Government shall be on territory granted to or acquired by the Commonwealth, and shall be at least a hundred miles in extent, and be not nearer than a hundred miles from Sydney, in the State of New South Wales. It was apparently agreed that the site should also, while not within a hundred miles of Sydney, be as near as possible to the boundary line; in the result the site of Dalgety was chosen in 1904 by Act No. 7 for the capital; it was, however, rejected in 1908 by Act No. 24, and after an exhaustive ballot a site at the district of Yass-Canberra fixed upon by the Fisher Government, and an Act for the acceptance (No. 23) passed in 1909, while New South Wales also passed an Act (No. 14) for the surrender, but as yet the city is still *in posse*, though an appropriation for it has been taken in the estimates for 1910 and plans invited. The choice of the site has, however, been the subject of much recrimination and difficulty, and the negotiations for the capital are one of the least satisfactory among the many troubled problems which have vexed the country since federation.[2]

It is probable that the Commonwealth must treat the federal capital as a place for which it must legislate and not convert it into a state. The territory surrendered by New South Wales by the Act of 1909 is over nine hundred square miles in extent, and includes access to the sea with a grant of two square miles, but no foreshore at Two-fold Bay, while

Governor of Norfolk Island, but in 1897 a new Order in Council was issued in order to entrust the administration to him as Governor of New South Wales, i. e. on ministerial advice, and a grant from the Imperial Government was made to enable the administration to start afresh. But in fact the Governor acts by his own views; there is a local elective Council of twelve with a magistrate, and the Governor has legislative authority. See *Parl. Pap.*, C. 4193, 8358; Order in Council, October 18, 1900.

[1] Cf. Harrison Moore, op. cit., pp. 590–2. Quick and Garran, op. cit., pp. 978, 979; Commonwealth *Parl. Pap.*, 1907–8, No. 18.

[2] See Turner, *Australian Commonwealth*, pp. 65–8, 73 seq., 188–90, 210, 244, 265, 268.

over a further area the Commonwealth will be able to control the water-supply. Over the country in question the Commonwealth will have full legislative authority for the first time, since in the case of Papua it has not chosen to exercise that authority as a rule, leaving legislation to the local Legislature. Besides the Act of 1909 for acquiring the territory, it has legislated in 1910 for its provisional Government, and has superseded the state conciliation laws.

Act No. 25 makes provision for the provisional Government of the territory transferred by the State of New South Wales for the seat of Government of the Commonwealth.[1] The most important provision is that contained in s. 12, which provides that until Parliament makes other provision the Governor-General may make ordinances having the force of law in the territory. Every such ordinance shall be laid before both Houses of the Parliament within thirty days after it has been made, or, if Parliament is not sitting, within thirty days after the next meeting of Parliament, and may be disallowed by resolution of either House of which notice has been given at any time within fifteen sitting days after the ordinance has been laid before the House. It is also provided that the Commonwealth *Conciliation and Arbitration Act*, 1904–10, the *Australian Industries Preservation Act*, 1906–9, and the *Secret Commissions Act*, 1905, shall apply to the territory in lieu of the laws of the State of New South Wales with regard to industrial disputes, conciliation, and arbitration. No Crown lands in the territory shall be sold or disposed of for any estate of freehold except in pursuance of some contract entered into before the commencement of the Commonwealth Act.[2] When land is acquired by the Commonwealth, the compensation paid for the land shall not exceed the unimproved value on October 8, 1908, together with the value of the owner's interest in the improvements on

[1] New South Wales arranged for the transfer by Act of 1909. The Crown lands are granted free as required in the Constitution; see Quick and Garran, p. 982. See *Parliamentary Debates*, 1910, pp. 5872 seq., 5945 seq., 6007 seq.; *Parl. Pap.*, 1909, Nos. 6, 23, 35, 47.

[2] Cf. Mr. Wise's suggestion in 1897, *Adelaide Debates*, pp. 1012–9.

the land at the date that it was acquired. For the enforcement of laws in force in the territory and the administration of justice the inferior Courts of the State of New South Wales shall continue to have the jurisdiction which they had before the commencement of the Act and shall exercise such jurisdiction as is conferred on them by ordinance by the Governor-General in Council.

(c) *The Northern Territory*

As early as 1907 the Parliament of South Australia passed an Act to permit of the surrender of the Northern Territory to the Commonwealth, but the acceptance of the territory was long delayed by difficulties as to the terms. The Northern Territory, though an integral part of South Australia, has always been treated in a different manner from the rest of the country, as has been rendered necessary by its infinitesimal white population and immense area. Moreover, the only railway communication in it consists of a line from Port Augusta in the state to Oodnadatta and a line from Port Darwin to the station Pine Creek, 146 miles south. The gap intervening between Pine Creek and Oodnadatta is no less than twelve hundred miles, and the state was in no position to spend the large sum necessary for the extension of the railway system.[1]

Under the terms of the Northern Territory Acceptance Bill of 1909 and the Act of 1910, the Commonwealth Government has taken over the whole control of the Northern Territory of South Australia, henceforth to be named the Northern Territory of Australia, the Civil Service and all

[1] Cf. St. Ledger, *Federation or Unification?* chap. v, for a concise view of the position from the Queensland outlook. The linking up of the northern, central and southern railway system of Queensland, there referred to as inevitable, has been arranged for by the Queensland Acts Nos. 11 and 12 of 1910, see *Parl. Pap.*, Cd. 5582, pp. 32, 33. The question of subdividing Queensland has been repeatedly discussed in the state, e. g. in 1891, 1896, and 1905. See also *Parl. Deb.*, 1910, pp. 221 seq., where the question whether a referendum would be needed under s. 123 of the Constitution or merely the consent of both State and Federal Parliaments is discussed.

Government institutions passing automatically to the Federation the moment the transfer took place.[1] As a consideration for the surrender of an area of 523,620 square miles, including many large navigable rivers, 1,300 miles of coastline, and several good harbours, South Australia was released from a financial burden which weighed very heavily on it, and of the obligation to develop territory which its means were inadequate to deal with. The Commonwealth took over the present loan liability on the Northern Territory, which amounted on June 30, 1908, to £2,725,761, representing the capital cost of the Port Darwin-Pine Creek Railway, harbours, public works, &c., plus the sum of £602,222, the accumulated deficit or advance account on the whole administration, bringing the total liabilities to be taken over to £3,327,983. In addition the Commonwealth Government is to acquire at cost price the Port Augusta-Oodnadatta Railway in South Australia, involving a liability of £2,242,342, and it is to complete the railway between Pine Creek and Oodnadatta at an estimated cost of £4,500,000. The state is to authorize the Commonwealth, under s. 51 (xxxiii and xxxiv), to construct a railway also to the western boundary of the state (as part of a railway to link the east and west), and to maintain and work the railways thus acquired. There is, it may be added, a serious difficulty as to the route of the railway in question. According to the interpretation placed by the Crown Solicitor of South Australia on the agreement for the surrender, which is to be carried out by the Acts passed in 1907 by the Parliament

[1] See Commonwealth *Parl. Pap.*, 1907, No. 4; 1909, No. 21; 1910, Nos. 22, 26; South Australia Act, No. 946. The Commonwealth Bill failed to pass in 1909 by a majority of two votes in the Senate. The Labour Ministry in the state in 1910 then returned pledged to repeal the Act of 1907 for the surrender, but on obtaining office Mr. Verran was, it is said, overruled by his colleagues and decided to accept the position. The Legislative Council passed through the House a Bill to repeal the Act, but the Lower House declined to accept the Bill, and ultimately, on the Commonwealth Parliament passing its Act, an Act, No. 1029, was passed in the state and the representation of the territories in the State Parliament was repealed. See *Parl. Pap.*, Cd. 5582, pp. 27, 28, 41.

of South Australia and in 1910 by the Commonwealth, the railway in question must pass completely through the territory of South Australia and the Northern Territory, and must not deviate into Queensland or New South Wales. On the other hand, it is very improbable that either Queensland or New South Wales will consent to the large expenditure on the trans-continental railway, unless it is also to be of service to these territories, and the strength of the two states in the Federal Parliament is almost certain to be sufficient to secure the decision that the route should deviate. Moreover, the Attorney-General of the Commonwealth has given it as his opinion that the agreement does not require the building of the railway entirely in the territory of South Australia and in the Northern Territory, and it seems to be beyond question that the late Mr. Price, by whom, as Premier of South Australia, the agreement was made, was prepared to see a deviation into Queensland or New South Wales. The matter may fall to be decided by the Courts if an agreement cannot be reached by negotiation.[1]

Acts No. 20 and No. 27 deal with the acceptance of the Northern Territory as a territory under the Commonwealth, and with the provisional administration of the territory.

By the former Act, which was passed under the powers given by s. 122 of the Constitution,[2] and in accordance with the agreement made with the state of South Australia and approved by the Parliament of South Australia by Act

[1] It has been doubted if there should not be a referendum under the Constitution as the legal preliminary to the surrender by South Australia; see *Legislative Council Debates*, 1910, pp. 181 seq. But the best opinion is clearly that this is needless; cf. *House of Assembly Debates*, 1910, pp. 597 seq. The surrender is under ss. 111 and 122, not under s. 123. See on all the points Commonwealth *Parliamentary Debates*, 1910, pp. 4423 seq., 4540 seq., 4633 seq., 4715 seq., 5010, 5094 seq., 5416 seq., 5552 seq.

[2] Cf. Commonwealth *Parl. Pap.*, 1909, No. 20, p. 36. The territory was assigned to South Australia by letters patent of July 6, 1863, issued in virtue of the Acts 5 & 6 Vict. c. 76, s. 51, and 24 & 25 Vict. c. 44, s. 2. These letters patent ceased probably to be revocable when the Act 63 & 64 Vict. c. 12, s. 6, made the Northern Territory beyond question part of the state. See South Australia *Parl. Pap.*, 1896, No. 113; Quick and Garran, op. cit., p. 375.

of 1907, No. 946, the agreement in question is ratified, and the territory is declared to be accepted by the Commonwealth under the name of the Northern Territory of Australia, including the Port Darwin and Pine Creek Railway, and all the state's right, title, interest in, and control of all state real and personal property in the territory, except moneys held by or on behalf of, or to the credit of, or due, or accruing due to the state at the date of the acceptance. All laws in force in the Northern Territory shall remain in operation until altered by any law of the Commonwealth, and any functions which are given under any law of the Commonwealth in force at the time of acceptance to state officers shall be exercised by such officers as the Governor-General shall appoint. The powers and functions vested in the Governor of the state, or the Governor with the advice of his Executive Council or any state authority, shall be vested in the Governor-General or the Governor-General in Council, or in such authority as the case requires, or as the Governor-General directs. The existing Courts of Justice shall continue until other provision is made by the Commonwealth Parliament, and magistrates and justices of the peace, and all public officers and functionaries, shall continue to hold office under the Commonwealth on the same terms as they hold office under the state.

All estates and interests held by any person within the Northern Territory shall continue to be held from the Commonwealth on the same conditions that they were held from the state.

The Government Residents and other officers may be transferred to the public service of the Commonwealth, preserving all their existing and accruing rights.

Trade, commerce, and intercourse, whether by sea or land, between the Northern Territory and the states shall be absolutely free.

The latter Act[1] provides that the Governor-General may appoint an administrator for the purpose who shall hold office subject to good behaviour for five years, and shall perform all the functions of his office according to such

[1] See *Parliamentary Debates*, 1910, pp. 5786 seq.; 6265 seq.

instructions as may be given to him by the Minister for External Affairs. The Governor-General may appoint or may delegate to the Minister or the Administrator power to appoint the officers necessary for the proper government of the territory.[1]

The Commonwealth *Conciliation and Arbitration Act*, 1904–10; the *Australian Industries Preservation Act*, 1906–9; and the *Secret Commissions Act*, 1905, shall be applied in the territory without restriction.

The principles of the *Lands Acquisition Act*, 1906, shall apply to the acquisition by the Commonwealth of any land owned in the territory by any person, but the compensation under the Act shall not exceed the unimproved value of the land at the passing of the Act with the value of the interest of the owner in the improvements on the land.

No Crown lands shall be sold or disposed of for any estate or freehold, except in pursuance of some contract entered into before the commencement of the Act.

The Courts of South Australia shall, subject to any ordinance made by the Governor-General, retain their jurisdiction for the enforcement of laws in force in the territory in the administration of justice, and they may exercise such jurisdiction as is conferred upon them by ordinance made by the Governor-General. Until the Parliament makes other provision for the government of the territory, the Governor-General may make ordinances having the force of law. Every such ordinance must be laid before both Houses of Parliament within fourteen days after being made; or if Parliament is not then sitting, within fourteen days after the next meeting of the Parliament, and any ordinance may be disallowed by a resolution of either House of Parliament

[1] By Ordinances Nos. 1 and 2 of 1911 the Administrator is rendered subject to the Minister for External Affairs, and provision is made for a Council not exceeding six to advise him in the administration, but, as in the case of Papua, the Administrator is not bound to follow the advice of the Council. By Ordinance No. 9 a Supreme Court of one judge is constituted, from which an appeal lies by leave of the Supreme Court of South Australia to that Court. A constitution for the territory is to be granted by Parliament in 1911.

of which notice has been given at any time within fifteen days after the ordinance has been laid before the House.

It may be added that ultimately no doubt the Colony of Fiji, the Protectorates of the Solomon Islands and the Gilbert and Ellice Islands, with the little Colonies of Ocean and Pitcairn Islands, Fanning and Washington Islands, and the innumerable guano islets under the British flag, will fall to be controlled directly by the Commonwealth and New Zealand, according to some well-conceived scheme. The whole Cook group was annexed to New Zealand in 1900 at the urgent request of Mr. Seddon,[1] and he then asked for the annexation of Fiji to the Colony, but Sir W. Lyne protested on behalf of New South Wales, and the Colonial Office have not assented yet to transfer the islands. Tonga [2] is still a protectorate with a local Government under a 'King', who acts in important matters on the advice of the British Agent there, while the New Hebrides [3] are a condominium shared between France and England under the Convention of 1906, and governed in a singularly complicated manner. The development there of British interests has suffered seriously from the fact that the Commonwealth has not been able to provide a preference for crops grown by aid of coloured labour in her markets, for they would compete with crops raised by white labour, and nothing save a substantial preference seems likely to be of avail.

§ 10. The Alteration of the Constitution

In the case of the Commonwealth Constitution two principles are adopted. In the first place, in all minor matters the Parliament is expressly permitted to alter by a simple Act.[4] For example, Parliament can divide the state into Senate electoral divisions, fix electoral divisions for the Lower House, alter the quota, can decide with regard to

[1] See Quick and Garran, op. cit., pp. 639, 640.

[2] *Parl. Pap.*, C. 9044; Cd. 38, 786[152]; *Colonial Office List*, 1911, p. 383.

[3] See *Parl. Pap.*, H. C. 385, 1881; C. 3814 (1883); 5256 (1888); Cd. 1952 (1904); 2385 (1905); 2714, 3159, 3160 (1906); 3280, 3289, 3300, 3523, 3525 (1907); 3876 (1908); *The Law of Tonga*, 1907.

[4] Quick and Garran, op. cit., pp. 647, 648.

electoral matters such as an increase or diminution of the number of the members of the Senate, the Lower House, the franchise for both Houses, qualification of members, and similar questions. It can also decide what quorum is required in the Senate, and what quorum is required in the House of Representatives. Parliament may also provide with regard to disputed elections, and has, as a matter of fact, by Act No. 10 of 1907 referred cases to the High Court, instead of either House, exercising the power given by s. 47 of the Constitution. Parliament also can deal with the salary of members, and has asserted its sovereignty by declining to make the increase of the salary to £600 a year conditional on the approval of the people obtained at a general election in which the question was formally discussed.[1] Parliament also has full right to legislate as to the powers, privileges, and immunities of the two Houses, and the penalties incurred by persons who sit when not properly qualified. Parliament also can legislate as to the number of ministers, their salaries, and the appointment and removal of civil servants. Parliament has a wide power which it has exercised by the Acts of 1903 and 1907 as to the regulation of the judicature, and by s. 74 of the Constitution can limit appeals to the Privy Council. Parliament also was empowered by s. 87 by a simple Act to make provision as to the appropriation after ten years of the revenue of the Commonwealth from customs and excise, and has exercised the power. It has also power by s. 96 to deal with financial assistance to the states, and with similar matters, such as audit by s. 97.

The substance of the Constitution itself is, however, dependent for alteration on the provisions laid down in s. 128.[2]

[1] Contrast the attitude of the Premier of Western Australia in 1910 when pressed to increase the salary of members in the then existing Parliament; the Bill of 1910–11 was not to take effect until the new Parliament met, but he yielded at last to the strong desire of the Parliament for an increase. The South Australia Act of 1910, No. 1025, provided for a referendum. On the other hand, Tasmania, by Act 1 Geo. V. No. 53, adopted an increase, as did Canada in 1905 by 4 & 5 Edw. VII. c. 43.

[2] Quick and Garran, op. cit., pp. 993 seq.; Harrison Moore, op. cit., pp. 597 seq.

128. This constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each state to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each state qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any state in which adult suffrage prevails.

And if in a majority of the states a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any state in either House of the Parliament, or the minimum number of representatives of a state in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the state, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that state approve the proposed law.

It is important to notice with regard to this section that

either House can take the initiative in requiring a referendum as to constitutional alterations.[1]

It will be seen at once how very wide the power of alteration is, and how easily on the whole it can be exercised. Apparently all the Constitution can be changed, but this view must not be pressed too far; for example, the purpose of the Act is expressed in the preamble, which with the enacting clauses is not subject to change; the purpose of the enactment is to create an indissoluble Federal Commonwealth under the Crown of the United Kingdom, and therefore the Constitution must still provide for the subordination of all authority to the Crown. Nor can the provisions in the Act as to ss. 5, 7, and 8, which are still in force, be altered, providing as they do for the operation of the laws of the Commonwealth, the validity and maintenance of the Acts of the Federal Council, and the application of the *Colonial Boundaries Act*, 1895, to the Commonwealth. Nor again on general principles may we believe that the Parliament can extinguish itself; the enacting clauses also refer to the action of the Parliament, and it may fairly be said that there must be a Parliament, as indeed there would certainly require to be in some form or other. But the power of change is very great, and there has already been introduced a Bill into the Parliament in the session of 1910 which expresses the wishes of those who would abolish the states as now composed, and vest the whole power of the Commonwealth in the Commonwealth Parliament, supplementing it by local Councils throughout Australia, which would normally manage local affairs, though, unlike the states, they would be subject to the paramount legislative supremacy of the Commonwealth, which thus could insist upon a general policy in these matters, in which uniformity is of importance.[2]

The mode of altering the Constitution is of remarkable simplicity, and distinguishes the Commonwealth Constitution from the Constitution on which it is so largely in some respects

[1] Cf. Quick and Garran, op. cit., pp. 986 seq.

[2] The Bill was not seriously pressed: it is mainly a transcript from the *South Africa Act*, 1909. Cf. Turner, *Australian Commonwealth*, p. 307.

modelled, the Constitution of the United States. The provision for merely absolute majorities, which is borrowed from some of the state Constitutions, is a sensible one, and avoids the difficulties in finding two-thirds majorities. Then the provision for deadlocks is very interesting. It differs from the provision in the case of ordinary legislation in s. 57 by allowing either House to institute a reform measure, and the direct reference to the people is given at an earlier stage than the reference by a dissolution in the case of ordinary deadlocks. This arrangement is fundamentally sound, for the Constitution is essentially a matter for the people to decide upon, and therefore there is no ground for allowing the Constitution to be kept back from their arbitration. Again, the interests of the states are consulted by the requirement for a majority in both states alike and in electors alike, and this requirement permits any three states to block any proposal of constitutional change. The provision as to the counting of only half the voters in any state where female suffrage existed was due to the fact that in 1900 female suffrage was not universal, and has become of no importance, since the Federal *Franchise Act* of 1902 made the female suffrage uniform throughout the Commonwealth.

The states are again safeguarded by the special provision at the end of the section under which any alteration diminishing the proportionate representation of any state in either House of Parliament or the minimum number of representatives of a state in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the state, or in any matter affecting the provision of the Constitution in relation thereto shall become law unless the majority of the electors voting in that state approve the proposed law. The proviso is well worded to secure that the section itself shall not be altered without the consent of the majority of the electors of the state. This is due, of course, to the fact that in the case of New South Wales the provisions of the Constitution of 1855, which required two-thirds majorities for certain amendments of the Constitution, were swept away by

simple majorities in 1857, and a similar provision in Queensland was repealed in 1871,[1] while another survived until 1908, then to disappear by a simple majority as a preliminary to action properly requiring a two-thirds majority, which could not have possibly been obtained even in the Lower House, where the numbers were only forty-seven to twenty-five.

The mode of taking the referendum is provided for by a Commonwealth Act, No. 11 of 1906, as amended by No. 20 of 1909, and again by No. 31 of 1910,[2] which provides for the issue of a writ to the chief electoral officer for the Commonwealth and the Commonwealth electoral officers in the several states. The interest of the state is recognized by the power of the Governor to demand a recount and to appoint a scrutineer, while the return for the state must be sent to the Governor. Any return may be disputed in the High Court, but a referendum is not vitiated by technical errors which have not been shown to have affected the result of the referendum.

No case has yet occurred of a deadlock between the Houses under this clause, but a simple referendum has taken place under the provisions of s. 128 on five occasions. The first occasion was in 1906,[3] contemporaneously with the general election of the House of Representatives of the Commonwealth on December 12. The question which was submitted was a minor point as to the date when the elections of senators should take place. Under the Constitution of 1900 the term of office of a senator began on the first day of January following the date of his election. This plan was found inconvenient, as the general election of the House of Representatives would normally take place in April, whereas the Senate elections would have to take place in the preceding December at the latest. The Commonwealth Parliament sat, as a rule, during the months from June to December, and experience showed that senators with

[1] See Queensland *Parliamentary Debates*, xi. 165 seq.; c. 163 seq.
[2] See *Parliamentary Debates*, 1910, pp. 6383 seq.
[3] See *Parl. Pap.*, 1907, No. 7, p. 23.

a general election before them could not give proper attention to business without disastrous results.

A law was therefore passed by the necessary majorities in both Houses under which the period of a senator's office was to commence on July 1. The law was submitted to the electors with the result that there was a large majority in each state in its favour. The figures were for the whole Commonwealth, 774,011 for, 162,470 against; but no fewer than 112,155 ballot papers were informal. The total percentage of voters to the electors enrolled was 50·17, viz. 56·35 male, 43·24 female.

In April 1910,[1] contemporaneously with the general election, two very important referenda took place. The first was to alter the Constitution so as to enable the Commonwealth to take over all the debts of the Constitution as existing at the time when they were taken over, and not merely the debts as they existed at the time of the establishment of the Commonwealth, Jan. 1, 1901. The arguments in favour of the change were obviously considerable; if it were advisable that the Commonwealth should take over the debts there was no sound reason for restricting that power to the case of the debts actually existing in 1901, and as a matter of fact the referendum was successful in all the states except New South Wales, which being apparently enamoured of its financial autonomy and its power of raising loans at low rates, objected to giving further power to the Commonwealth. The totals for in the Commonwealth were 715,053 to 586,271, but in New South Wales the numbers were 159,275 to 318,412. There were no fewer than 96,209 informal ballot papers. The percentage of voters who voted in favour of the law to the total number of electors enrolled was 31·66 per cent.; the percentage of voters who voted not in favour was 25·96 per cent.

The other proposal was a readjustment of the Commonwealth and the state finances. It was proposed by agreement between the states and the Commonwealth Government under Mr. Deakin that payment of 25*s.* per head should be

[1] See *Parl. Pap.*, 1910, No. 1.

made to each of the states for ever in place of the arrangement by which, under s. 87 of the Constitution, three-fourths of the net customs and excise revenue were paid over to the states. It was thought that this arrangement would relieve the Commonwealth of the burden of having to raise £4 for every £1 which it wished to spend, and that, on the other hand, the states would know better what sums they would receive from the Commonwealth in each year, while the automatic increase of population would lead to an automatic increase of the sums payable. At the referendum this proposal was defeated through the exertions of the Labour party in the states of New South Wales, Victoria, and South Australia; in the latter case by a very small majority.

The total vote in favour of the law was 645,514 against 670,838, and 82,437 papers were informal. The voting in the states was as follows :—

New South Wales	For, 227,650;	against, 253,107
Victoria	,, 200,165;	,, 242,119
Queensland	,, 87,130;	,, 72,516
South Australia	,, 49,352;	,, 51,250
Western Australia	,, 49,050;	,, 30,392
Tasmania	,, 32,167;	,, 21,454

The percentage of voters for to the total number of electors enrolled was 28·58; of those against, 29·70.

In this case the objection of the Labour party was not to the actual terms but to the principle of making the arrangement part of the Constitution, and therefore only open to alteration by a formal alteration of the Constitution. The Sydney *Bulletin*, which represents the Labour party in one of its aspects, pointed out that the acceptance of the proposal was most undesirable inasmuch as it would permanently enable the three small states, Queensland, Western Australia, and Tasmania to prevent any alteration of the terms, though such alteration was deemed essential by overwhelming majorities in the large states. There can be little doubt that this argument weighed heavily against the acceptance as it stood of the alteration of the Constitution.

As regards the mere merits of the proposal it is sufficient to say that the new Government of Mr. Fisher, which won at the general election, proceeded to adopt the terms which had been arranged upon, but by means of an ordinary Act, which can, of course, be altered by the Parliament at any time by ordinary legislation (Act No. 8 of 1910) as distinct from the amendment of the Constitution.[1]

The case was of importance as showing that the Commonwealth Government was by no means prepared to accept as desirable the making permanent and changeable only by the referendum of any financial provisions, and their attitude was noteworthy because the referendum in the abstract was a part of the Labour ' plank ' throughout Australia.

The other two referenda have been discussed in full above.

NOTE A

The Referendum in the Dominions.

The referendum has been used on the whole very little in the Colonies for any purpose whatever.[2] Even in the cases where a referendum is possible it has seldom so far been employed, and little assistance as to the merits or demerits of the system can be drawn from Colonial conditions, which differ very greatly from English conditions. The use of a referendum in the Colonies has been confined to cases which may be classified as follows :

(1) Cases of great constitutional changes, viz. the formation of the Federation of Australia and the Union of South Africa.

(2) Alterations of Constitution.

(3) Decision of questions which Parliament for one reason or another is anxious to avoid deciding itself.

The referendum has never yet been used in the Dominions to settle a dispute between the two Houses of Parliament, although provision exists in the Constitution of the Commonwealth as regards constitutional questions, and in that of Queensland, that it should be used for this purpose.

(1) The first case of its use is of importance and interest, because it is remarkable that it completely differed from the precedent of the formation of the federation of Canada. In

[1] Turner, *Australian Commonwealth*, pp. 269–72.

[2] For the Australian cases, cf. Harrison Moore, *Quarterly Review*, 1911, pp. 529 seq.; *Parl. Pap.*, Cd. 5778, 5780 ; for Natal, Cd. 5099, and p. 949, n. 1.

that case there was no referendum at all, in only one instance was a general election held, and the assent of the Parliaments was considered sufficient authority for the formation of the union of the provinces and the abandonment by the provinces of their autonomy. In the case of Australia, on the other hand, as has been seen above, the greatest care was taken to secure the fullest consultation of the people. The Constitution was drafted by a convention elected by popular vote ; it was ratified by referenda in every Colony of the proposed Commonwealth.

In the case of the Union of South Africa the model of Canada was followed as regards the Transvaal, the Orange River Colony, and the Cape ; affirmative votes of Parliament were there the acceptance of the new Constitution. In Natal matters were otherwise, for a considerable opposition developed itself, and the Government decided that it would be advisable to have a poll, which was accordingly taken, with the somewhat unexpected result that the majority in favour of the acceptance of the Union was overwhelming. The figures were : for, 11,121 ; against, 3,701 ; majority, 7,420.

(2) The ordinary Colony has full power to alter its Constitution, subject, in some cases, to certain formalities. This principle, however, obviously cannot be applied to cases of a federation proper ; a federation is a quasi treaty, and to allow the federal authority to vary the Constitution would be unacceptable to the states which are federating. In the case of Canada so strongly is this recognized that the Constitution as a whole, and in particular the distribution of powers between the provinces and the Dominion, cannot be altered except by an Act of the Imperial Parliament, and no such Act, as was authoritatively stated in 1907, would be passed unless the Imperial Government were satisfied that it was desired by not only the Federal Government, but also the Governments of the provinces concerned. The only alteration which substantially affects the provinces was made at the request of the federation and of all the provinces except British Columbia in 1907, when the federal subsidies were readjusted by 7 Edw. VII. c. 11.

In the case of the Commonwealth of Australia it was desired by the framers of the Constitution, who based themselves somewhat exclusively upon United States models, that it should be in the power of the Commonwealth itself to alter its Constitution, and accordingly a clause was inserted in the Constitution for that purpose. The terms of the provision as embodied in s. 128 of the *Commonwealth*

of Australia Constitution Act, 1900, have been given above, with details of the five referenda so far held under it.

(3) Of referenda taken to decide important issues on which Parliament was not prepared to express its opinion decisively, there may be mentioned the following :—

In 1896 a referendum was taken in South Australia with regard to the introduction of religious education into the state schools. In New South Wales, Western Australia, and Tasmania, where denominational teaching is not official, there is permitted as a part of secular teaching undenominational religious instruction. In Victoria, in Queensland until 1910, and in South Australia, the schools were secular. After the introduction of female suffrage into South Australia it was thought by those persons who favoured denominational teaching in state schools that the female vote would probably help towards securing their wishes, and a referendum was accordingly taken under the authority of a resolution passed for the purpose by the Assembly on December 16, 1895, contemporaneously with the general election of April 1896.[1]

The electors were asked three questions : whether they desired the continuance of the existing system ; whether they desired the introduction of scriptural instruction in school hours ; and whether they were prepared to approve state capitation grants to denominational schools for secular results. The numbers were as follows :—

For the continuance . . .	51,681 ;	against,	17,819
For denominational education	19,280 ;	,,	34,834
For grants	13,349 ;	,,	42,007

No less than 12,830 votes were informal.

The result was that no change was made in the system, but the voting is remarkable as showing how different the numbers were on the several issues, and they illustrate how various the results might be of referenda according as the referendum was worded. 66·30 of the electorate voted.

In the years 1892–4 referenda were taken under Acts of the provinces of Manitoba, Ontario, Prince Edward Island, and Nova Scotia, on the question of the prohibition of liquor in these provinces, and the results were in favour of prohibition. As it was not possible, however, to effect these results completely by provincial legislation, attempts were made to induce the Parliament of Canada to take up the matter. Accordingly, a referendum of the whole of Canada was taken under an Act (c. 51) of 1898, and the result was

[1] See South Australia *Parl. Pap.*, 1896, No. 44, p. 9.

a majority of some 14,000 for prohibition out of a total vote of 543,058.[1] No more than 23 per cent. of the electorate were those in favour of a prohibitory law, and Sir Wilfrid Laurier, in the Canadian House of Commons on March 21, 1899,[2] definitely stated that the voice of the electorate as expressed was not such as to warrant the Government in introducing a prohibitory measure, and he indicated that unless at least one-half of the electorate recorded their votes in favour of the policy it would not be possible to expect Parliament to pass a prohibitory measure. Nor has Parliament taken any steps to pass that measure, partly no doubt in view of the continuous hostility of the Province of Quebec.

In 1910 a referendum was taken in Queensland under the authority of Act No. 11 of 1908 on the question of religious instruction in the schools. The referendum was taken contemporaneously with the general election for Members of the House of Representatives of the Australian Commonwealth, and the result was decisively in favour of the introduction of denominational education with a conscience clause. Parliament accordingly passed an Act (No. 5) permitting such education. It should, however, be noted that the case was very exceptional. The Premier and several members of Parliament who voted for the Bill expressly explained that they were hostile to the measure, but that they thought themselves bound to carry out the decision of the people as expressed at the referendum; though there was a majority of 17,000[3] in favour of the proposal, the total vote was small —about 54 per cent.—and was declared by the opponents of the Bill to be completely unrepresentative. At any rate, the result appears to have given rise to widespread dissatisfaction in Queensland. The cost was £4,879 18*s.* 3*d.*

Under Act No. 1025 of South Australia of 1910, a referendum was taken in April 1911 to decide whether the salaries of members of Parliament should be increased from £200 to £300. The Parliament of the Commonwealth in 1907, and those of Tasmania and Western Australia in 1910, increased

[1] The actual figures were: for, 278,487; against, 264,571. The total electorate was 1,236,419. There were majorities in all the provinces save Quebec. See Canada *Sess. Pap.*, 1899, No. 20; Biggar, *Sir O. Mowat*, ii. 527–40; Hopkins, *Sir J. Thompson*, pp. 423 seq.

[2] *Debates*, i. 99. Ibid., i. 95, will be found a strong pronouncement by the Prime Minister showing that his view was that a referendum was only justified by the undertaking given by the party before coming into power. So as regards reciprocity in 1911 he repudiated the referendum theory.

[3] Exact figures were: for, 74,228; against, 56,681; informal, 7,651.

the salaries of their members without reference to the people. But this step has not passed without a good deal of criticism in Australia, which accounts for the decision of the Government of South Australia to let the people have a voice in so important a matter.[1]

It should also be noted that while local option is a normal feature in the Dominions, a further step has been taken by New Zealand Act No. 46 of 1910, under which, in addition to voting for local option, a referendum will be taken contemporaneously with the next general election on the issue of national prohibition. Voters are required to vote either for or against such prohibition, and if three-fifths are in favour of prohibition, the proposal shall be carried, and national prohibition shall come into force on the expiration of four years from the date of the election at which the proposal was carried.

In New South Wales a referendum was taken in 1903 in order to ascertain the views of the people on the proposed redistribution of seats, in view of the general feeling that as some of the most important functions of government have been handed over to the federation the number of members in the State Legislative Assembly might advantageously be reduced. Under the *Reduction of Members Referendum Act*, No. 13 of 1903, the electors were given the option of having 125 members or 100 or 90. 47·19 of the electors voted. 63,171 voted for the *status quo*, 13,316 for 100 members, and 206,273 for 90. There were 41,484 informal votes, or 14·67 of the total number voting.

In Victoria in 1904, on the strength of a resolution by the Legislative Assembly of the state, despite the disagreement of the Legislative Council, a referendum was taken by Sir Thomas Bent on the question of education. The electors were asked :—

(1) whether they wished the Education Act to remain secular ;

(2) whether they wished the scheme of Scripture lessons recommended by the Royal Commission on Religious Instruction to be taught in the schools during school hours to children whose parents desired the teaching ; and

(3) whether they were in favour of the prayers and hymns selected by the Royal Commission being used.

The answers to all three questions were in the affirmative by majorities of 26,249, 8,955, and 9,450. As the answer to

[1] Turner, *Australian Commonwealth*, pp. 158-63. The figures were : for, 42,943 ; against, 89,042 ; informal, 1,700 : percentage of votes, 61·88. See *Parl. Pap.*, 1911, No. 36.

the first, which was carried it will be noticed by about three times the majorities of the answers to the second and third questions, negatived the answers to the second and third, no action was or could be taken on the result of the referendum.

As mentioned above, no instance has yet occurred in which the difference of opinion between the two Houses has been settled by the referendum. Provision for settling differences between the two Houses in this manner does not form any part of the ordinary Colonial Constitution. The only exceptions to this rule are that of the Commonwealth in the case of constitutional alterations and that of Queensland. The first case is, however, quite exceptional, and it is only adopted because every constitutional alteration requires a referendum, and as the whole trend of the issue of the referendum in such cases means that the will of the people is to be superior to the will of Parliament, it is natural that the referendum should be allowed to decide whether or not the two Houses agree. But for ordinary deadlocks there is no such provision at all. The procedure in such cases is a joint sitting of the members of the Senate and the House of Representatives, which follows upon a dissolution of the two Houses preceded by the passing twice of a Bill by the Lower House and its rejection by the Upper House. It is worth noting that in the case of a constitutional alteration either House can bring about a referendum, which again is in harmony with the principle of the referendum.

In the case of Queensland, under Act No. 16 of 1908, whenever a Bill has been twice rejected by the Legislative Council, the Governor in Council may, after the close of the session in which the Bill was rejected for the second time, direct that the Bill shall be submitted by referendum to the electors, and thereupon the electors are entitled to vote, and on a majority of the votes recorded being in favour of the Bill the Bill shall be presented to the Governor for the royal assent. A Bill is deemed to be rejected a first time when it has been passed by the Legislative Assembly not less than one month before the close of a session of Parliament, and then transmitted to the Legislative Council, which before the close of the session has either rejected or failed to pass the Bill, or passed the Bill with any amendment in which the Legislative Assembly does not concur. A Bill is deemed to have been rejected a second time when the Legislative Assembly in the next session of Parliament has, after an interval of not less than three months from the first rejection of the Bill, again passed the Bill, or a Bill substantially the

same, and transmitted it to the Legislative Council for its concurrence not less than one week before the close of the session, and the Legislative Council, before the close of the session, has either rejected or failed to pass the Bill, or passed the Bill with any amendment in which the Legislative Assembly does not concur, and by reason of which the Bill has again been lost.

The circumstances in which this Bill was passed are of some interest. It will be remembered that in 1907 the Governor of Queensland refused to add members to the Upper House at the request of Mr. Kidston, in order to secure the passing of measures to provide for the abolition of the postal vote, and the passing of a Wages Boards Bill, which was to apply to the pastoral and agricultural industries.

Mr. Philp took office on the resignation of Mr. Kidston. He was refused supply by the House of Assembly, but was granted a dissolution by the Governor, Lord Chelmsford, who thought that it was desirable that the country should decide upon the issue. The country decisively rejected Mr. Philp by a large majority in favour of the coalition of Labour and Mr. Kidston's party against him, and Mr. Philp at once resigned, Mr. Kidston returning to power. Mr. Kidston, however, was not satisfied with the position which he occupied as resting upon a coalition of Labour and his own party, and he decided to secure his position by abandoning Labour and forming a coalition with his former opponent, Mr. Philp. This he did after securing the passing of an Act (No. 5) which incidentally removed the postal vote and a *Wages Boards Act* (No. 8), and the result of the agreement is embodied in the Act No. 16 which has been mentioned above. That Act has never been put into force, and whether it will be put into force is doubtful, but it must be admitted that the existence of the Act will greatly alter the position of the Upper House. Prior to the passing of the Act it would have been constitutional for the Governor to swamp the Upper House if desirable at any time. The thing had been done more than once in New South Wales, and the principle was in effect conceded in 1892 in the case of New Zealand, as is shown by the fact that the Government in 1907 selected the anniversary of Lord Ripon's dispatch of 1892[1] as the Dominion Day of New Zealand. Now it is clear that as a matter of constitutional practice swamping should not take place, as another means of deciding disputes between the two Houses has been decided upon. It remains to be seen

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 39.

whether or not the new arrangement will be more satisfactory than the old.

As far as appears, the proposal of a referendum for deciding matters of dispute between the two Houses is not at present favourably regarded in any part of the Dominions.

The Bill introduced into the House of Lords in 1911 by Lord Balfour of Burleigh to provide for the taking of a poll of the parliamentary electors went much beyond anything which exists in the Colonies.[1] It is true that in the Commonwealth and in Queensland there is provision for a referendum in cases of Bills being rejected by the Upper House, but these provisions differ considerably from those in Lord Balfour's Bill, and in particular there is no provision for an artificial majority such as that laid down in s. 10 of the Bill, which required that the total affirmative vote in the United Kingdom must exceed the total negative vote by not less than 2 per cent. of the latter vote before a Bill could be presented for the royal assent. This provision in Lord Balfour's Bill was clearly and unquestionably, as compared with Colonial laws, undemocratic. In the case of the Commonwealth, and in the case of Queensland alike, the requirements of the law are satisfied by majorities, and there is no attempt to secure an artificial majority of 2 per cent.

Completely without parallel in the Dominions was the provision proposed to be made by the second section of Lord Balfour's Bill for the reference to the people of Bills which had been passed by both Houses of Parliament, but against which a petition signed by not less than 200 members of the House of Commons, praying that the Bill might be submitted to a poll of the Parliamentary electors, was presented to the Crown. In no Dominion is there any provision or any suggestion of a provision that an Act which has received the approval of both Houses should be passed upon by the people, and the requirement of an artificial majority of 2 per cent. would add strongly to the obvious objections to such a provision. It is true that the Labour party in Australia has advocated for years the use of the referendum for challenging laws passed by the Parliament, just as can be done in Switzerland in certain conditions, but it is clear that for this particular proposal there is no popular demand in Australia generally, and this special view belongs to the socialistic propaganda of the Labour party, which is completely out of harmony with the wishes of many of the people of Australia.

[1] *House of Lords Debates*, vii. 657 seq., 713 seq.

In Canada opinion seems on all sides completely opposed to measures like the referendum ; it has never been seriously proposed as a solution for deadlocks between the Upper House (which is limited in point of members, and cannot therefore be swamped) and the House of Commons, and when proposed for the purpose of reviewing measures of Parliament in the case of Ontario in 1905, the Premier emphatically declined to have anything to do with it on the ground that it was inconsistent with responsible government, a fact which can hardly be disputed.[1]

It may not be out of place to observe that the referendum in both Canada and Australia has been quite unable normally to secure adequate voting on the part of those to whom it is submitted. Thus, even in the case of the referenda for the establishment of the Commonwealth Government, when the utmost efforts were made to arouse the interest of the electors, the vote was about 50 per cent. of the possible voters, considerably less than the average vote at ordinary elections. This result is presumably due to the difficulty of interesting electors in matters comparatively abstract when divorced from personalities, and it should be noted that the first three referenda held under the Commonwealth Constitution Act took place simultaneously with the general elections, so that almost necessarily a comparatively large vote was secured. The referenda which took place in April 1911 showed that in the absence of the excitement of a general election large numbers of voters cannot be induced to vote, and that they found it difficult to understand the issues. There are few figures available of the cost of a referendum, for the reason that most Commonwealth referenda have been held contemporaneously with a general election, so that no separate figures of cost could be obtained, but a preliminary vote of £40,000 was placed on the Commonwealth estimate for the referenda in April 1911, and the cost was about £50,000.

It may be added that for constitutional purposes referenda without statutory authority are useless. In South Australia under a resolution of the Assembly of Dec. 22, 1898, a referendum was taken in April 1899 to ascertain the views of the electors on the extension of the Council franchise to all householders as provided in the Assembly Bill of 1898. The votes were: for, 49,208 ; against, 33,928 ; informal, 11,015 ; 61·78 voted, but the affirmative vote did not result in any concession then by the Council.

[1] *Canadian Annual Review*, 1905, p. 266.

CHAPTER III

THE UNION OF SOUTH AFRICA

§ 1. The Formation of the Union

At the beginning of February 1909 the National Convention, which had sat at Durban and at Capetown, concluded its labours and laid before the public of South Africa in the form of a Bill the scheme which the members of the Convention had agreed on for the Union of South Africa, to be constituted in the first instance from among the four Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, or from any two or more which would consent to join. The draft Act was then laid formally before the four Colonial Parliaments, and amendments to the draft were discussed in each. Of these none were carried in the Transvaal. In the case of Natal several were adopted, and the Government in accepting the Act declared that it must be submitted to a referendum before the Colony accepted union. In the other two Colonies the draft was accepted subject to certain amendments. The National Convention reassembled at Bloemfontein in May and discussed the draft with the amendments proposed by the Parliaments of the Cape and Natal, and the result was that the draft was reaffirmed with certain alterations and signed by the delegates of all the Colonies as altered on May 11. It was then submitted to the judgements of the several Parliaments and to a referendum under Act No. 2 of 1909 in the case of Natal. Delegates were appointed by the Parliaments after approving the revised draft to proceed to England, and to secure the passing of the Bill into law as an Act of the Imperial Parliament, and the Bill[1] was introduced accordingly in the House

[1] Printed as *Parl. Pap.*, Cd. 4525, as revised by the Convention as Cd. 4721, and, revised, as H. L. 113, 1909, for introduction into Parliament. The Act is 9 Edw. VII. c. 9. See Brand, *Union of South Africa* (1909); Keith, *Journ. Soc. Comp. Leg.*, x. 40–92; Egerton, *Federations and Unions*, pp. 231–91, and the Debates of the Colonies for 1909.

of Lords in the month of July, after its passage without substantial alteration, and subject only to drafting amendments, had been foreshadowed by the Under-Secretary of State for the Colonies. It was debated in the Lords on July 27 and August 3, in the Commons on August 16 and 19, but no amendments were adopted.

The appearance of the Union Constitution is a striking example of the rapidity with which a political movement may under favouring circumstances come to a head. Federation is indeed old in South Africa, and the Orange Free State desired in 1858 a political federation, which the Home Government were not prepared to approve in view of their anxiety to limit their responsibilities in the north.

It is easy to censure the Imperial Government for lack of foresight in not accepting Sir G. Grey's federation scheme, but the many burdens on the Imperial Government in 1859 rendered its attitude wise. Federation was beyond all doubt premature when there was not even a single responsible-government Colony in the whole of South Africa.[1]

Federation was also under consideration when the grant of self-government to the Cape was being discussed in 1871, but steps towards bringing it about were rendered impracticable by the discovery of diamonds in Griqualand West, the consequent dispute as to the ownership of the territory, and its annexation by the Governor of the Cape on instructions from the Imperial Government. Until that difficulty was disposed of in 1877 it was quite impossible to expect the Orange Free State to regard favourably any proposal whatever which emanated from the Imperial Government, and Lord Kimberley did not press the matter further. But Lord Carnarvon, in the Conservative régime, was more adventurous: he had been connected with the Colonial Office during the arrangement of Canadian federation, and he felt a mission to secure a federal union. The result was the mission of Mr. Froude—ostensibly private—

[1] The episode is discussed in an interesting way in Henderson's and Collier's *Lives* of Sir George Grey, and in Cana's *South Africa*, pp. 36 seq. For the official papers, see *Parl. Pap.*, H. C. 216, 1860.

to South Africa and the unexpected appearance of Lord Carnarvon's proposal for federation in 1875.[1]

It is clear that the whole procedure in 1875 was from first to last unfortunate. In any case, it is probable that an attempt at union was premature. The Orange Free State and the Transvaal were by no means prepared to surrender so much of their independence as would have been involved in the acceptance of federation. The Cape of Good Hope, which had but recently obtained self-government, could not reasonably be expected to surrender the autonomy which it had so recently secured. Natal was not yet in possession of responsible government, and there was naturally feeling in the Cape against being put on a level with Natal.

But the fatal mistake which was made by Lord Carnarvon was in attempting to ignore the Cape Government. Apparently Mr. Froude, who had visited South Africa as a preliminary to the confederation dispatch of 1875, had realized that the Cape was likely to cause difficulty, and, at any rate in his dispatch of May 4, 1875,[2] Lord Carnarvon committed the fatal error of suggesting that the Cape should be represented by Mr. Molteno, acting for the western province, and by Mr. Paterson for the eastern province. The Government of the Cape could not be expected to feel other than indignant at this step, which seemed to perpetuate the differentiation between the two parts of the Cape, and to hold out a prospect of the carrying out of the step refused in 1872, when the Imperial Government had definitely declined to accede to the petition of the eastern province of the Cape for separation from the western province. To add to the indignation on this head there was also the consideration that Natal and Griqualand West, both under the control of the Imperial Government, were to be represented at the Conference, thus reducing the position of Mr. Molteno to that of marked inferiority. The Cape Ministry at once showed their indignation.

[1] See *Parl. Pap.*, C. 1244 (1875); C. 1399 (1876); H. L. 40, C. 1632 (1877); C. 1980 (1878). Froude discussed the question at length in his book on his visit, and alludes to it in *Oceana*. For the other side, see P. A. Molteno, *Sir John Molteno*, i. 329 seq.; ii. 1 seq.

[2] C. 1244, p. 2.

At the Governor's earnest request they agreed to present to Parliament copies of Lord Carnarvon's dispatch, but only with the addition of a minute in which they distinctly stated that it was most undesirable that the Government of the Cape should be represented as proposed by Lord Carnarvon. The unfortunate distinction between the two provinces which had been productive of much inconvenience no longer existed and should certainly not be revived in any way. They considered that it should be left to the free action of the Colony to decide the numbers of representatives and their selection.

Lord Carnarvon answered the dispatch in which Sir H. Barkly reported the decision of his ministers, which had been approved by the House of Assembly by a majority of 32 to 23, in a dispatch of July 15, in which he assured the Cape Ministry that he had no desire to interfere with their discretion in the administration of their internal affairs, but he protested against the doctrine that His Majesty's Government in inviting a group of Colonial Governments to deliberate upon matters of common interest were infringing the rights of a Government which turned out not to approve of the invitation. He proposed, however, that if the Cape Government decided not to take part in discussion, nevertheless discussion should take place between such of the other Governments as were anxious to do so.[1] In the Upper House of the Cape Parliament the reception of the proposals was somewhat more friendly. Mr. Froude, who had been selected by Lord Carnarvon to represent him at the Conference, proceeded to the Cape, and finding that he could not induce Mr. Molteno to take part in the Conference, committed the indiscretion of taking part in an agitation against the Government, especially in the eastern province. Mr. Froude

[1] See C. 1399, pp. 5 seq. No such conference was ever held: instead matters of importance were discussed separately with Mr. Brand, President of the Free State, in London in 1876, but the question of federation was not raised, as the Free State Legislature had declined to allow the President to discuss it (see C. 1631, p. 47; C. 1980, pp. 17 seq.). An attempt to induce Mr. Molteno to share a discussion with Natal representatives then failed; C. 1631, pp. 61–79.

later on, in his report of his proceedings, explained with great ability the reasons which had induced him to act as he did. After making all possible allowances, it is undeniable that his action was injudicious. At any rate, Mr. Molteno became a convinced opponent of federation, and though Lord Carnarvon still retained hopes that he might be able to further his pet idea, the annexation of the Transvaal, which he expected to assist the project, really proved ultimately fatal to it, for in June 1880, though a Cape Ministry favourable to federation and Sir B. Frere were in office, the influence of the Transvaal leaders secured the rejection of the motion for federation, and the rebellion in the Transvaal and the retrocession in 1881 terminated the prospect of union.

It is significant that Mr. Froude anticipated Lord Selborne[1] in laying great stress on the advantage which would accrue to South Africa by freeing itself on federation from interference from the Imperial Government. He sympathized energetically with the Government of the Orange Free State in their dispute with the Imperial Government and the Cape as regards the ownership of Griqualand West, and he held out both to the Orange Free State and the Transvaal Republic the prospect of freedom from interference with the native policy as a result of federation.

It was not until after the Boer War that the ideal once more came within the range of practical politics, and the impulse to union was strengthened by the existence of union in the Commonwealth. But until the grant of responsible government to the Transvaal in 1906 and to the Orange River Colony in 1907 further progress was impossible, though under Crown Colony administration some efforts towards the end in view were made by the creation of a common railway administration for the two Colonies of the Transvaal and the Orange River in the shape of the Intercolonial Council,[2] which dealt also with questions of expenditure in connexion with the South African Constabulary, a force common to both Colonies. A more important matter was the voluntary union of the four

[1] *Parl. Pap.*, Cd. 3564, p. 18.

[2] See Orders in Council, Sept. 15, 1902; May 20, 1903; Apr. 21, 1904; Jan. 12, 1905; May 10, 1905.

Colonies and of Rhodesia, together with the territories under the administration of the High Commissioner for South Africa, in a customs union which was concluded in 1903, and renewed in 1906. In connexion with this union the statistical service of South Africa was unified and located in a head office at Capetown. The grant of responsible government to the Transvaal and Orange River Colony seemed for a moment to throw things back: the Intercolonial Council was not a popular institution, and the South African Constabulary was deemed too dear; as a result the Council was dissolved, the joint liabilities were divided between the two Colonies,[1] and the South African Constabulary ceased under that name to exist and was replaced by local police forces under Colonial control. For the railways, however, a new board of management was constituted with five members, two from the Orange River Colony, and three from the Transvaal, which managed the railway system of the two Colonies. It was felt that any attempt at separate management was out of place.

The establishment of responsible government was almost at once followed by the rise of an effective demand for a federal government. One sign of this feeling was the discussion of a Federal High Court for South Africa as a Court of Appeal, to some extent in place of the Privy Council, which took place first in South Africa in 1905, and then at the Colonial Conference of 1907,[2] even before the actual issue of the new letters patent granting responsible government to the new Colonies. The causes for the rise of this feeling were various. One important consideration was the railway question: the Cape and Natal were ever at variance with the Transvaal as to the share of traffic from the Rand to the sea. There are three great routes available, via Delagoa Bay, via Natal, and via the three Cape ports of Port Elizabeth, East London, and Capetown itself. The prosperity of the railways in each Colony practically depended on their success[3] in securing a considerable proportion of the through traffic, and the Transvaal was thus in a preponderating position. Its hands,

[1] Cf. *The Government of South Africa*, ii. 4.

[2] *Parl. Pap.*, Cd. 3523, pp. 207 seq.

[3] Cf. *The Government of South Africa*, i. 212 seq; Cd. 3564, pp. 20 seq.

however, were tied by the fact that in 1901, in order to secure the continuance of a supply of native labour for its greatest industry, the Transvaal made an agreement with the Portuguese Government under which the old proportion of traffic as between the Portuguese and British routes was to be maintained through the medium of railway rates. This question, bitterly disputed, was the main source of the conviction that there must be some form of federal action to solve the difficulties of the position, and its effect was increased by the serious financial depression which lies on South Africa as an aftermath of the war. The Transvaal alone was in a really prosperous position, with an industry every year more productive and an abundant supply of native labour for the time being, while the Cape was financially in a grave position of embarrassment leading to wholesale retrenchments and hardship. Natal again had had to face a serious native rebellion and a threat of renewed trouble, with the result that the colonial finances were seriously embarrassed.

In these circumstances the natural sentiment for federation, which was strengthened by the proceedings of the Conference of 1907, when the strength of the Commonwealth and the Dominion of Canada was contrasted with the multiple representation of the small white population in South Africa, grew steadily. The report of the Native Affairs Commission [1] of 1903–5, which insisted on the need of treating native affairs from the point of view of South Africa as a whole, was reinforced by the condemnation of the actual administration in Natal by the Natal Native Affairs Commission of 1906–7.[2] The High Commissioner, Lord Selborne, at the instance of the Cape Government, felt that a useful purpose could be served by the publication of a memorandum on the whole matter, and issued a paper in which the various points on which unity of action was desirable were set forth clearly and in detail.[3] The result of the publication

[1] *Parl. Pap.*, Cd. 2399. [2] Ibid., Cd. 3889.

[3] Ibid., Cd. 3564. Cf. also the proposals of 1907 for common military action, and various proposals for agricultural co-operation, detailed in *The Government of South Africa*, i. 101; ii. 148.

was to focus public attention on the question, and after much discussion at the Conference of May 1908 for the revision of customs—the Transvaal demanding lower duties—and railway rates, the idea took practical shape in the selection of delegates from the several Colonies with the authority of the Colonial Governments and Parliaments to discuss the basis of a unification in some way of South Africa.

The actual Constitution which resulted from the labours of the delegates was not, as was originally expected by the advocates of some union, a federal one, but an Act of Union. The preamble expressly says that it is desirable that the Colonies in South Africa should be united under one Government in a legislative union under the Crown of Great Britain and Ireland, and that it is expedient to make provision for the union of the Colonies and to define the executive, legislative, and judicial powers of the Government of the Union. In this respect the Government stands in striking contrast to the Government which would have been set up under the Constitution of 1877.

The Constitution which was proposed in 1877[1] was a purely federal one, though the term 'union' was used in the title and in the preamble. The provisions of the Act were mainly based on those of the *British North America Act*, 1867: for example, in the Executive Government the Governor-General was to be advised by a 'Privy Council'. The legislative power was vested in a Union Parliament consisting of a Legislative Council, to be constituted as the Crown should direct, and an elective House of Assembly in which due provision was to be made for the representation of the natives. Provision was made for the decennial readjustment of representation in the Parliament and for proportionate representation of the provinces. The provisions as to royal assent to Bills, reservation, and disallowance were precisely modelled on those of the Canadian Act. The Union was to be divided into provinces which

[1] 40 & 41 Vict. c. 47. The arguments against federation in South Africa are set out at length in *The Government of South Africa*, i. 260 seq., 303 seq., 357 seq.

were to have Councils or Parliaments, the details of the Constitutions being left to the Crown to decide. The Act, however, provided, on the model of the *British North America Act*, by ss. 33 and 34, for the exercise of powers by the Union and Provincial Parliaments respectively. The classes of subjects given to the two Legislatures were almost exactly the same as those laid down in ss. 91 and 92 of the *British North America Act*. The Provincial Councils had, therefore, exclusive powers in all merely local or private matters. The power of disallowance of such laws was vested, as in Canada, in the Governor-General. The distribution of legislative powers was not absolutely determined by the Act, because by s. 37 power was given to vary by Order in Council the distribution of powers laid down in ss. 33 and 34. Power was given to the Union to organize a Supreme Court of Judicature and a general Court of Appeal; but it was expressly provided (s. 51) that no Act of the Union Parliament should be sufficient to abridge the power of the Crown to grant special leave to appeal to the Crown in Council. The Parliament and Government of the Union were given, by s. 54, the same powers as were given to the Government and Parliament of the Dominion by s. 132 of the *British North America Act* with regard to treaties. All laws respecting natives or native affairs or immigration, and all laws passed by the Provincial Councils relating to the tenure of land, were required to be reserved unless owing to some urgent emergency, when the law could be assented to, but had to be sent home at once. The Constitution could be altered by Act of the Union Parliament, but such a Bill required to be reserved under s. 56 of the Act. Power was taken for the admission of new members into the Union by Order in Council on addresses from the Union Parliament and the Legislature of the territory to be admitted. On admission, the territory admitted was to be entitled to proportionate representation in the Legislative Council and the House of Assembly.

The most significant parts of the Bill from the constitutional point of view were perhaps the assertion in s. 11 that

powers vested in the Governor-General[1] were to be exercised by him acting on his own discretion and without the advice of the Privy Council;[2] and the provision in s. 19 for the due representation of the natives in the Union Parliament and in the Provincial Councils in such manner as should be deemed by Her Majesty to be without danger to the stability of the Government.

Effect could only be given to the Act up to August 1, 1882, and, as circumstances prevented anything being done at that date, the Act lapsed, save as to one section (58) allowing the Crown from time to time to annex territories to the Cape.

Under s. 4 of the Act the King in Council is empowered by proclamation at any time within a year from the passing of the Act to declare that the four Colonies of the Cape, Natal, the Transvaal, and the Orange River Colony shall be united as a Legislative Union with the name South Africa. The King may then appoint a Governor-General and the Union shall come into force at the date given in the proclamation, but which must not be more than a year after the passing of the Act. The Colonies joining the Union at the start become original provinces with the same boundaries as at present, the Orange River Colony being styled the Orange Free State Province, and any Colony which does not join can only enter later on by virtue of an Order in Council made under the powers taken in the Act for the entry of new provinces (such as Rhodesia).

It will be seen at once that the assent of the Colonies con-

[1] *Per contra*, the Tasmanian *Interpretation Act*, 1906, s. 12, provides that the term 'Governor' means Governor acting with the advice of the Executive Council, a curious and unusual provision, which renders necessary a new definition in the Act No. 10 of 1908, s. 2, respecting indeterminate sentences, where the duty is cast on the Governor personally. The South Africa *Interpretation Act*, 1910, has followed this model; cf. above, p. 150, n. 1.

[2] This seems to go too far. For example, by s. 20 the Governor-General was empowered to summon the House of Assembly: that he should not be advised by the Council as to this would have been absurd. The real point is not 'without advice', but the existence of power to disregard advice; such a power the Governor-General must and does have, or the Government would be completely transferred to ministers.

cerned is assumed as given ; the preamble merely recites the approval of their existing Parliaments, without reference to the people at all. In the case of the Commonwealth of Australia, in every instance not merely did the Parliaments assent but referenda took place, so that the electors were fully responsible for the decision to accept federation. In the case of Canada the electors were not in all cases consulted, inasmuch as the Governments of Canada and Nova Scotia on their own responsibility accepted confederation. For that error the Nova Scotia Government were turned out of office at the next general election, and Nova Scotia returned to the Federal Parliament members pledged to agitate for the undoing of the Union so far as it concerned Nova Scotia. Eventually it was found possible, through the influence of the Imperial Government, and by the exercise of tact on the part of the Federal Government, to arrive at a compromise, under which the Federal Parliament undertook to pay Nova Scotia a larger sum than it originally had contemplated as a contribution towards the provincial finances, and the province acquiesced in the new arrangement and Mr. Howe entered the Dominion Parliament.

It must be confessed that the precedents were in favour of a fuller consultation of the electors than was in this case required.[1] It must be admitted, moreover, that the Parliaments then existing were not elected with a view to union or federation, and that it is somewhat contrary to principle that Parliaments elected merely for the ordinary conduct

[1] In Natal arrangements were made to hold a referendum under Act No. 2 of 1909, a promise to this effect having been given on September 3, 1908, by the Prime Minister. The voting on January 10, 1909, was unexpectedly decisive, viz. 11,121 to 3,701, the number of electors registered in 1908 being 25,463. Only one vote was allowed to each elector, and in every electoral division of the Colony the majority was decisive. Only a simple majority was required, following the precedent of the New South Wales enabling Act No. 2 of 1899; see *Parl. Pap.*, Cd. 5099. Cf. the criticisms in *The Empire Review*, xviii. 114 seq., where it was pointed out that the Senate would represent the existing Colonial Governments and could not be changed for ten years, while the nominee Senators would represent the first Government for ten years also.

of public affairs should accept an arrangement which sanctions the abolition of their separate existence.[1] No question of their legal competence of course arose, if for no other reason because the Act to be passed was not to be passed by them at all, but by the Imperial Parliament, which is entitled to do what it thinks fit in the matter. The real justification for being ready to do without a referendum was no doubt the fact that there was no substantial dissatisfaction, at any rate in three of the Colonies, while the referendum in the fourth as a matter of fact did not alter the state of affairs as far as regards it, and the Parliament was clearly shown to be in sympathy with the popular feeling on the question. The preamble ignores the referendum in Natal, mainly no doubt in the interests of simplicity.

§ 2. The Executive Government of the Union

The provisions of the Constitution as to the Executive Government[2] of the Union are very closely modelled on those of the Australian Constitution. The Executive Government is declared by s. 8 to be vested in the King, and is to be exercised by the Sovereign in person or by a Governor-General as his representative. The provision for the personal exercise of the power is new: it does not occur in the Australian or Canadian Constitutions, though it is not excluded by either, but a curious problem arises as to the exact position of His Majesty if he did as a matter of fact visit either Canada or Australia. It is clear from the Constitutions of either country that the Governor-General would continue to exercise all his functions, and the somewhat curious position would arise that the Sovereign had no exact constitutional position in one of his own dominions. For example, any Bill passed by the Parliament

[1] Colonial Parliaments are of course not in any way bound by law to consult the constituencies on important measures: for example, in 1907 the Commonwealth Parliament increased members' salaries in the face of a good deal of adverse feeling in the country, and in 1910 Tasmania and in 1911 Western Australia followed suit, while South Australia preferred a referendum (Act No. 1025, 1910). Cf. p. 923, n. 1.

[2] ss. 8–17.

during his stay would have, under the Constitution Acts in either case, to be presented to the Governor-General for his assent, unless indeed the Governor-General were to appoint His Majesty his deputy for the purpose! This anomalous position would not necessarily exist in the case of South Africa, since the Sovereign could actually administer the Government in person: yet by s. 12 the Executive Council is to advise only the Governor-General, and nothing is said of advising the King in person, a curious omission of doubtful signification.

The appointment of the Governor-General is, of course, vested by s. 9 of the Constitution in the King: the appointment is to be during pleasure, and he may exercise within the Union such powers and functions as the King may be pleased to assign to him. The salary of the Governor-General is fixed at £10,000 a year and is not to be diminished during his tenure of office: it was originally proposed that if any person other than the Governor-General was appointed to administer the Government he should not be entitled to receive from the Union any salary in respect of any other office during the period of his administration, but in the final form of the Bill this proviso was dropped.

In view of the power of the Crown to limit the delegation of authority, the office of Governor-General was of course created by letters patent under the Great Seal, and delegated to the Governor-General the ordinary executive power of the Crown, including special mention of the prerogative of mercy. Provision was made for the succession to the Government in the case of the absence or incapacity of the Governor-General, the Chief Justice being appointed to act as Governor-General. The prohibition originally intended of the payment of salary from Union funds was omitted, as the Chief Justice of South Africa could hardly have been expected to administer without additional remuneration if he continued to perform the work of his own office, and for this reason no doubt the clause was amended to omit the prohibition. It may be noted that under the wording of the Constitution it would appear doubtful whether the Governor-

General on leave of absence could receive under any conditions half-pay, as it appears to be contemplated that the officer acting as Governor-General shall receive the full salary.[1] Moreover, no power to appoint deputies was expressly given in the Constitution as drafted. The omission was somewhat striking in view of the inclusion of such a power in the Constitutions of Australia and Canada, and the power to appoint deputies must therefore have been regarded as somewhat doubtful, though it might no doubt have been exercised as it is in the other Dominions and states under the letters patent. This omission, however, is made good in s. 11 of the Act, but is limited to cases of temporary absence. It is also significant that the power of the Governor-General is expressly confined in s. 9 of the Act to the limits of South Africa, and that accordingly it will not be possible for him to perform authoritative acts when he is not within the actual territories of the Government, though the contrary is implied in s. 11. This is a salutary rule, as the practice of allowing Governors to perform official acts while beyond the territorial limits of their Colonies is of doubtful propriety and legality.

The salary fixed is the same as in Canada and Australia : its value will doubtless be considerably increased by allowances, and there is little probability of any attempt to diminish the amount, as was the case in Canada shortly after federation, when the importance of the viceregal position was hardly realized in the Dominion, and when Canadian thrift was shocked at the idea of one man spending so much.

Generally speaking, the Constitution transfers to the Governor-General or the Governor-General in Council respectively all powers, authorities, and functions which at the time of the establishment of the Union are vested in the Governors or Governors in Council of the Colonies. There is, however, one significant exception : by s. 147 the control and

[1] The same remark applies to the case of the Commonwealth and of Canada, and the Australian states, but in all cases arrangements are made for the division of the salary in the absence of the Governor-General and Governor, and this is perfectly legitimate. In New Zealand the matter is regulated by No. 22 of the *Consolidated Statutes*, 1908.

administration of native affairs and of matters affecting specially or differentially Asiatics throughout the Union shall vest in the Governor-General in Council, who shall likewise exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and shall control all native reserves, which if previously inalienable save by Act of a Colonial Parliament shall remain inalienable save under an Act of the Union Parliament. The insertion of this clause is no doubt intended to do away with the previous rule, under which in native affairs the Governor of Natal was especially bound by the royal instructions of 1893 to act on his personal discretion after consultation with ministers, while a similar rule is clearly implied in the provisions of the Constitutions of the Transvaal[1] and Orange River Colony.[2]

The fact that a power is assigned to a Governor or to a Governor in Council is not a distinction of much importance.[3] By the royal instructions issued to the Governor he is told to consult his ministers, and constitutional practice renders their advice equally necessary in the cases where legally he must act in Council and in those where he can legally act without ministerial advice. There is, in fact, no act which a Governor should do without advice, if his ministers are willing to advise, and the only matter of importance is to decide when to accept and when to reject that advice. In considering this question the Governor can receive in the great majority of cases no help from the mere legal fact of an Order in Council being required or not. Nor again, must it be remembered, is the legal difficulty absolutely fatal: it is

[1] Letters Patent, December 6, 1906, s. 51.

[2] Letters Patent, June 5, 1907, s. 53.

[3] The *Interpretation Act*, 1910, No. 5, of the Union provides that Governor-General shall in all cases mean Governor-General in Council, a curiously logical insistence on the rule of ministerial responsibility. Cf. Higinbotham C.J. in *Attorney-General* v. *Goldsbrough*, (1889) 15 V. L. R. 638, at p. 647; Sir J. Macdonald in C. 2445, p. 153; Lefroy, *Legislative Power in Canada*, p. 193, n. 1; Barton, *Melbourne Federal Debates*, pp. 2253, 2254; above, pp. 150, n. 1; 729, n. 3; 948, n. 1.

true that s. 13 of the Constitution requires that if the Governor-General in Council is empowered to do something he must act with the advice of his Council—a phrase borrowed from the Australian Constitution and no doubt synonymous with the requirement of the Canadian Constitution, ' by and with the advice '—but the Executive Council remains in the last resort in the Governor-General's control : for in the first place he can always dismiss the existing members, and he can in the second place fill it up for the moment in any way he pleases.

It might have been expected that in this regard the new Constitution would have endeavoured to go beyond the Australian precedent just as that Constitution went far beyond the precedent of Canada, but this is not the case. The *British North America Act*, 1867,[1] decides that there shall be an Executive Council, styled the Privy Council for Canada, but it in no way defines the mode in which that Council is to be constituted. The Australian Constitution [2] not merely calls a Council into being, but it provides that the officers appointed by the Governor-General to administer the departments of State are to be the King's Ministers of State for the Commonwealth and also members of the Federal Executive Council.[3] It is important to note that they are not the only members of the Council ; the number is unlimited and all hold office at pleasure. Precisely similar provisions occur in the case of the South African Constitution. There are to be not more than ten Ministers of State, who will also be Executive Councillors, but they will not constitute the Executive Council, which remains undefined in point of numbers. But while the Governor-General is thus

[1] s. 11.

[2] 63 & 64 Vict. c. 12, Const. ss. 62, 64. Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 709–11.

[3] There was a strong party in favour of abandoning responsible government *in toto* ; see *Sydney Federal Debates*, pp. 782 seq. But responsible government prevailed. Neither in Australia nor in the Union is there any fixed number of ministers assigned to the Senate ; in point of fact, in 1910–11 only one senator was a minister in the Union : in Australia there are, in view of the strength of that House, two or three.

still able to disregard as a mere matter of law Parliamentary considerations in the question of the appointment of his Council, an important restriction exists under both the Australian and the South African Constitutions on his choice of advisers : after the first general election no minister [1] can hold office for more than three months unless he obtains a seat in either House of Parliament. The provision is not new in South Africa, as it appears in the Natal Constitution of 1893, by which, however, the time allowed for obtaining a seat is four months. The provision of the Constitution as it stands is borrowed from Australia, and it was also adopted in 1903 by Victoria. It is still left elsewhere to constitutional practice, and quite recently ministers have held office in Canada, Newfoundland, Queensland, and Western Australia for considerable periods while without places in Parliament.

The ministers appointed on the formation of the Ministry were : Minister of Agriculture (who was Prime Minister) ; Minister of Railways and Harbours ; Minister of the Interior, Mines, and Defence ; Minister of Justice ; Minister of Education ; Minister of Finance ; Minister of Lands ; Minister for Native Affairs ; Minister of Commerce and Industries ; Minister of Public Works, Posts, and Telegraphs ; and a minister without a portfolio. Of these, three, including the Prime Minister, were from the Transvaal, four from the Cape, two each from Natal and the Orange River Colony. The Premiers of three Colonies took places, but Mr. Merriman, Premier of the Cape, refused to do so.

The rest of the officers of the Government are made subject to the control of the Executive Council by vesting their appointment by s. 15 in the Governor-General in Council, except where the appointment is delegated by the Governor-General in Council or other provision is made by law for the mode of appointment. The clause is a commonplace of Colonial Constitutions and is designed to distinguish ministers who hold office at pleasure, and are selected by the Governor-General directly from public servants whose tenure is in

[1] s. 14.

effect permanent as compared with that of ministers, who are dependent on Parliament for their position.

It is, however, significant that there is no mention of the political conventions of the Constitution in the Act. Strictly speaking, there is no need even for the ministers to do more if they desire to hold office permanently than to secure for themselves seats in Parliament, and they can be up to the number of eight nominee members of the Upper House. The Governor-General's instructions make no mention of the convention by which he chooses ministers who possess the confidence of Parliament, and he will do so merely in accordance with the established practice. It might have been expected that the Constitution would have gone further in this regard, but the old custom is convenient, and it is always possible that any attempt to define more closely the nature of the Executive Government might have led to difficult questions of law. The Constitution does not even define the quorum of the Executive Council, and it is not provided for in the royal instructions to the Governor-General.

The control of the military and naval forces within the Union is vested in the King or in the Governor-General as his representative, by s. 17. This provision is rather curious; the corresponding provision in the case of the Commonwealth refers to the naval and military forces of the Commonwealth, and while the provision of the *British North America Act* includes the land and naval militia and all naval and military forces of and in Canada, the command-in-chief in that case is vested only in the Crown,[1] and it is by the letters patent that the Governor-General is given the title commander-in-chief.[2] This title, which is held by practically every Colonial Governor, is merely honorific,[3]

[1] Otherwise in the Quebec Resolutions; see *The Framework of Union*, p. 27. See 30 Vict. c. 3, s. 15; 63 & 64 Vict. c. 12, Const. s. 68.

[2] By a mere accident this was not done until 1903, when the omission was noticed.

[3] The title has led to confusion when conferred by local Act; see the case of New South Wales in 1869, Clark, *Australian Constitutional Law*, pp. 266 seq.; below, p. 1263.

and does not apply to the Imperial naval forces, but apparently in South Africa the command-in-chief will apply also to the Imperial naval forces while in South African waters. Of course it carries with it no actual power of any kind whatever.

§ 3. The Parliament of South Africa

The Parliament is to consist of the King, a Senate, and a House of Assembly. The Senate[1] was to be composed in the first instance of eight nominated members selected by the Governor-General in Council, of whom four should be selected on the ground of their thorough acquaintance by reason of official experience or otherwise with the reasonable wants and wishes of the coloured population of South Africa. In addition each province elected eight members. These members were chosen by the two Houses of the Colonial Parliament sitting together on the principle of proportional representation with the single transferable vote, on a date before the day appointed for the coming into effect of the Union. In both cases the senators will hold office for ten years, and casual vacancies will be filled up by the Governor-General in Council in the case of nominated members, and in the other cases by the Provincial Councils on the principle of proportional representation with the single transferable vote; but those appointed by the Councils will only hold office until the expiration of the first ten years. Parliament may provide as to the manner in which after the expiration of ten years the senators shall be elected, but if no special provision is made it will be carried out by the Provincial Councils sitting together with the members of the House of Assembly for the province on the principle indicated above. A senator must be thirty years of age, be qualified as a voter for the election of members of the House of Assembly in one of the provinces, have resided for five years in the Union as constituted at the time of his nomination or election, be a British subject of European descent, and if an elected member be possessed of immovable property within the

[1] ss. 19–31.

Union of the clear value of £500 over and above any special mortgages thereon. The Senate shall elect a President, who may be removed from office by a vote of the Senate or who may resign by writing under his hand addressed to the Governor-General. The quorum is twelve, and the President or other presiding officer shall only have a casting vote.

It will be noticed that the Senate combines in a curious manner the principles of nomination and of election. There is no parallel for that in South Africa, where the Upper Houses of Natal, the Transvaal, and the Orange River Colony were nominee and that of the Cape elective. Nor has a combination of nomination and election yet been tried in the Upper Chamber of any of the other Colonies enjoying responsible government, though a proposal to remodel the Parliament of Canada on this basis was introduced into the Senate in 1909 by Mr. Scott, late Secretary of State in the Dominion Cabinet.[1] The motive of the rule is, however, sound —it is often desirable to secure the presence in the Parliament of some outstanding man who could not be expected to face or to be successful in an ordinary election, and for whom special provision should be made. The requirement that the half of the nominated members should be selected on account of their knowledge of native wishes, so far as they are reasonable, will not of course be capable of legal enforcement, and the Governor-General in Council will alone be qualified to decide what amount of acquaintance will satisfy this requirement,[2] but no doubt it will ensure that there will always be on the Senate a small body of men who are thoroughly acquainted with the native problem : the others may probably be skilled lawyers. Again, the length of

[1] Cf. also the Imperial Act of 1854, which allowed the introduction of the elective system into the Upper House of Canada, but saved existing rights.

[2] There was some irritation in South Africa among the opponents of the Government because Sir F. Moor, originally selected as a minister, was made a senator on ground of his knowledge of the natives when he failed to win a seat at the general election. Cf. *House of Commons Debates*, 1909, ix. 1530. The others selected were Mr. Krogh, Mr. Schreiner, Colonel Stanford, all admirable candidates.

tenure of office on the part of the members is longer than is usual elsewhere where there are elective Upper Houses: the ordinary duration of such Houses is six years, and the principle of a rotation of retirements ensures that the complexion of the House is always being changed more in the direction of bringing it into harmony with the views of the electorate. The nominated Upper House of Natal sat for ten years. It should, however, be added that the power of dissolution applies under s. 20 to the Senate as well as to the Lower House, though nominee members of the former body are not affected by dissolution. The property qualification is borrowed from the practice in the Cape, where, however, it was higher, being fixed at £2,000 immovable property or £4,000 movable property; in Natal it was £500 immovable property: in this respect, as in many others, the Constitution is not democratic,[1] as compared with that of Australia. The age-limit is normal in all the Dominions, but is not the rule in the Commonwealth. The requirement of European descent [2] is unusual, but is derived from the state of affairs in the Transvaal and the Orange River Colony, and also substantially in Natal, where the native has neither the franchise nor the right to be elected a member of Parliament.

The Lower House [3] is to be composed of members directly chosen by the voters of the Union in electoral divisions defined by a commission selected from the judges of the several Colonial Supreme and High Courts. Under the

[1] In *The Empire Review*, xviii. 118, the qualification is considered too low.

[2] The needlessness of this exclusion is emphasized, ibid.; and see Mr. Schreiner's letter to *The Times*, July 27, 1909, p. 9; *House of Commons Debates*, ix. 1549 seq., 1044. Cf. Sir J. Ward's view cited by Sir C. Dilke, ix. 980. He pointed out the fact that the Maoris have members—Maoris—in either House of the Dominion Parliament. The Act of 1877, s. 19, contained a provision proposed by Mr. Forster for the representation of the natives in any Union Parliament. Mr. Lyttelton, ix. 1580, thought that the exclusion was inserted when it was proposed to have proportional representation, and retained when the intention of having this and the possibility of a selection of a native had disappeared.

[3] ss. 32–50.

original draft each division was to return three or more members, unless for special reason in case of sparsely populated regions the number might be reduced by the commission. In defining the divisions the commission would be guided by the quota obtained by dividing the total number of voters in each province as settled at the last registration by the number of members of the Assembly to be elected in that province, and would divide the districts so that the number of voters in each division should be a multiple of the quota, and the number of members to be elected should be equal to the multiple. At the Bloemfontein Conference the principle was adopted of single-member constituencies, and the divisions will contain as nearly as may be the quota. The commission could, however, pay attention to (*a*) community and diversity of interests, (*b*) means of communication, (*c*) physical features, (*d*) existing electoral boundaries, (*e*) sparsity or density of population, and may vary the quota to as much as 15 per cent. either way.

The number of members to be elected in the first case is fixed at fifty-one for the Cape, thirty-six for the Transvaal, and seventeen each for Natal and the Orange Free State Province. These numbers shall in no case be diminished unless the total number of members of the Assembly chosen for the four original Colonies reaches 150 or ten years have elapsed from the Union, whichever is later. Provision is made for the increase of the number of members on the result of the census of 1911 and of each quinquennial census thereafter. The quota of the Union will be fixed by dividing the total number of male European adults in the Union as ascertained by the census of 1904 and as specified in the Act itself by the total number of the members of the Assembly as constituted under the Act, and each province will be entitled to an additional member or members if its population has increased since the census of 1904 by a number equal to the quota or a multiple thereof. No additional member shall, however, be allotted to any province until the total number of European adults in such province exceeds the quota of the Union multiplied by the number of members

allotted to the province for the time being, and thereupon additional members shall be allotted to such province in respect only of such excess. As soon as the number of the Assembly reaches 150 no further increase is to take place unless Parliament otherwise decides, and the distribution of members among the provinces will then be made so far as possible uniformly proportionate to the number of European male adults in that province. The allocation of any additional members to divisions and the redivision thereby rendered necessary will be carried out by a commission of three judges appointed by the Governor-General in Council. The redivision and allocations shall only take effect at the first general election after they have been made.

These elaborate provisions are based on those contained in the Constitutions of the Transvaal [1] and the Orange River Colony,[2] and are intended to avoid the evil seen in the Cape and in Natal, where representation has at times completely disagreed with the alteration in population. They will probably be effective for their purpose, though inevitably rather complicated.

The qualifications of members are that they must be qualified to be registered as voters [3] for the election of members of the Lower House in an electoral division of the Union, have resided five years in South Africa, and be British subjects of European descent.[4] Here again the colour bar is noteworthy, and marks a retrogression from the point of view of the Cape practice. Provision is made that the voters at Assembly elections shall be those qualified to vote in the existing Colonies for the election of members of the Assembly, while in matters of procedure, such as registration

[1] Letters Patent, December 6, 1906, s. 15 and Sched. iii.

[2] Letters Patent, June 5, 1907, s. 18 and Sched. iii.

[3] This excludes female members, and there is no female suffrage, which would be peculiarly out of place in a country like South Africa. Cf. *The Government of South Africa*, ii. 396 seq.; *House of Commons Debates*, ix. 1611, 1612.

[4] These words, like 'European adults', are vague, and the question was raised whether a South African or an American was a European; see *House of Lords Debates*, ii. 863; *House of Commons*, ix. 1603, 1604.

of voters, election petitions, and so forth, the laws of each Colony are to apply in the elections in each new province. There are, however, excluded from the franchise (as in the Transvaal and Orange River Colony) all soldiers on full pay, and further, while the date of the nomination of members is not, as originally proposed, to be the same throughout the Union, all polls are to be held on the same day, a provision which in a place of vast distances like South Africa will reduce to a minimum plural voting.

The Parliament may legislate for the qualifications of electors, but no such law shall disqualify any person who is, or may become, entitled under the laws of the Cape as existing at the time of the Union to be registered as a voter from being registered as a voter in the Cape by reason of race or colour alone, unless such law shall be passed by the two Houses sitting together, and passed at the third reading by a two-thirds majority of the total members of the two Houses. No person, however, who is registered as a voter in any province at the date of the passing of such a law may be removed from the register because of a disqualification of race or colour alone. This provision [1] is intended to safeguard the rights of the native voters in the Cape ; it is, however, somewhat doubtful if it is adequate for the purpose. The native vote has been, even in the Cape, subjected to serious criticism, and the South African Native Affairs Commission [2] in their report were inclined to prefer the expedient of the nomination of representatives of the coloured races rather than the direct participation of these races in the franchise. Of the four original provinces only one recognizes in fact a native franchise, and therefore there may be a strong movement in any new Parliament to couple the provision of some sort of representation for natives with the abolition of the native franchise in the Cape. It was therefore suggested in the Cape that the clause should be amended to require the assent of two-thirds of the Cape members for the passing of any law disqualifying natives in that province for the franchise on colour or race grounds. On the other

[1] s. 35. [2] *Parl. Pap.*, Cd. 2399, pp. 67 seq.

hand, it was argued that there was little chance of the passing of any disfranchising measure of this kind, and that the safeguard of a two-thirds majority of both Houses should be adequate. The Bloemfontein Conference strengthened the position by in effect requiring any such Bill to be reserved,[1] and in introducing the Bill in the House of Lords, Lord Crewe indicated that such a Bill might be refused the royal assent.[2]

Under the original draft the election of members of the Assembly was to take place on the principle of proportional representation with the single transferable vote, and the Governor-General in Council was to issue regulations as to the arrangements for counting the votes on this principle; on such regulations being promulgated they were to have the force of law unless and until Parliament otherwise provided; but at the Bloemfontein Conference this proposal was rejected at the wish of the Cape and the Orange River as a compromise in order to obtain the retention of the principle of equal electoral areas.

The Governor-General has, as formerly in the Cape, the unusual power of dissolving both Houses simultaneously or of dissolving the Assembly only;[3] he cannot, however, dissolve the Senate for ten years after the Union, and in no case is the dissolution to affect senators nominated by the Governor-General in Council. There must be a session every year.[4] The Parliament will sit at Capetown (s. 23), though the capital of the Union for other purposes is Pretoria (s. 18), while the Supreme Court will sit normally at Bloemfontein.

The disqualifications for membership of the two Houses are the same:[5] they follow the usual lines and include

[1] A clause is placed in the royal instructions to this effect, as the legal question is not free from doubt; see Colonel Seely in *House of Commons Debates*, ix. 1635, 1636, who had discussed the matter with Mr. Schreiner.

[2] See *House of Lords Debates*, ii. 761, 863–5. Cf. Lord Curzon (766), Lord Lansdowne (795), Archbishop of Canterbury (789 seq.); see *House of Commons*, ix. 1634 seq., 958 seq. (Colonel Seely).

[3] s. 20. [4] s. 22. [5] s. 53.

bankruptcy, insanity, conviction of treason or murder or any other crime punished by twelve months' imprisonment without the option of a fine, and the holding of an office of profit under the Crown within the Union. From this last disqualification are exempted persons who are Ministers of State in the Union, or are in receipt of pensions or of naval or military half or retired pay. This exemption saves ministers from having to face re-election on the acceptance of office, a practice which is inconvenient and is gradually disappearing in the Dominions. Members of the Provincial Councils [1] are also disqualified from holding seats as members of Parliament, and a member of one House cannot be a member of the other. Seats in either House are vacated on the occurrence of any of the disqualifications set forth above, and also if the member ceases to hold the proper qualifications or does not attend, unless with special leave, for a whole session of Parliament. Members of both Houses are to receive salaries at the rate of £400 a year as against £300 a year in the original draft, less £3 (originally £2) for each day's absence—not an extravagant remuneration in view of the cost of living in South Africa. The privileges of Parliament are to be such as are declared by Parliament,[2] and in the meantime those of the House of Assembly of the Cape. Both Houses can make rules and orders for the conduct of their business, and until they do so the rules and orders at present in force in the Legislative Council and House of Assembly of the Cape shall apply to the Senate and the House of Assembly of the Union. In the case of joint sessions of the Houses, which will be convened by the Governor-General by message, the Speaker of the Assembly shall

[1] In Canada this result was not originally contemplated, but opinion changed, and in 1873 the rule of exclusion became general—though a member of the Legislative Council of Quebec can also be a senator of Canada. In Australia it was desired by several members of the Federal Convention that state members of Parliament and Government should have places in the Commonwealth Parliament (*Sydney Federal Debates*, pp. 1009 seq.), but jealousy prevailed and both states and Parliament excluded the other.

[2] See Act No. 21 of 1911.

preside, and the rules of the Assembly shall prevail. Ministers may speak in either House, but can only vote in that House in which they have seats (s. 52).[1]

The Parliament is given plenary power of legislation for the Union,[2] subject to the requirement of the royal assent and the possibility of disallowance by the Crown. The Governor-General is to declare, according to his discretion, but subject to the provisions of the Act and also to the royal instructions, that he assents in the King's name, or that he withholds assent, or that he reserves a Bill for the signification of the King's pleasure. He may also return a Bill with amendments for the further consideration of the House in which it originated. The King may further disallow any Act within a year after the assent of the Governor-General, and such disallowance will, on being communicated to Parliament by speech or message or by proclamation, have effect as annulling the law. Similarly a reserved Bill must be assented to within a year of the time when it was presented to the Governor-General for the royal assent, or it will have no effect. These rules differ in one or two points from the established practice. They follow the example of the Commonwealth in leaving to the Governor-General's discretion the question of reserving Bills, and in the original draft made no allusion to the possibility of instructions being given by the Crown to the Governor-General, a possibility expressly recognized in the *British North America Act*, 1867 (s. 55), and in the *Australian States Constitution Act*, 1907. Of course this did not really prevent the giving of instructions, as the Governor-General as an Imperial officer is subject to His Majesty's directions, or again the discretion he is to use is not, it may be said, his individual discretion, but his discretion as an Imperial officer; but to avoid doubt the Bloemfontein Conference inserted a reference to the royal

[1] So also in Victoria under Act No. 1864, but there not as of right but by permission, and only one minister at a time can use the permission; the Union provision is that formerly in force in the Transvaal, Orange River Colony, Cape, and Natal.

[2] ss. 59–67. This was advised by the Chief Justice of the Cape.

instructions.[1] In any case the power will doubtless be sparingly used, and only on the gravest Imperial grounds. It may be remembered that only one Commonwealth Bill has been reserved since the inauguration of the Commonwealth ; that was the British Preference Bill of 1906, which purported to give a preference to British goods imported in British vessels manned exclusively by white labour, which was reserved on the advice of ministers as it was deemed to be counter to treaty obligations, and which was by the consent of the Commonwealth Government allowed to lapse.

The restriction of the period of disallowance to one year is borrowed from the Australian precedent, which had its origin in the *Federal Council of Australasia Act*, 1885, and is in accord with the practice in the Canadian Provinces. It cannot be said to be altogether convenient, since if the Act was one which contained objectionable matter among satisfactory provisions the Imperial Government would be put in the difficult position of either disallowing a measure of value or of allowing it to stand good without amendment, whereas if two years were allowed the Act might be allowed to stand on the understanding that it should be amended in the next session of Parliament. This inconvenience has been felt by the Dominion Government in the case of Provincial Acts, and the only alternative procedure, that of allowing the Act to stand on the faith of a promise of amendment, is not a convenient one. Ministers in the Dominions cannot often control the Parliaments, and a failure to carry legislation is apt to give rise to charges, tacit or explicit, of bad faith, and to lead to friction. Fortunately the probability of legislation seriously defective being passed by the Union Parliament is not sufficiently great to render the matter of much concern. Similarly the restriction of the time within which a reserved Bill may be assented to to one year, which is not precedented even in Australia, though it applies to the Canadian Provinces, is open to objection, indeed more serious objection than in the other case.

[1] See *Sydney Federal Debates*, p. 779, when a formal amendment was not accepted, the position being regarded as clear.

§ 4. The Government of the Provinces

The provisions of the Act [1] for the administration of the provinces are the most original in the whole Constitution, and are not unworthy of close consideration. The provinces are not in any way to be set up as rivals to the Union, and therefore the system of government must not be a replica, in however faint a form, of the central government: the party system is to be continued in the ordinary central government, but it is not to be allowed to remain in force in the provinces. Therefore the legislature of the provinces is in no sense to be a Parliament and the executive is not to be an Executive Council, but an Executive Committee.

The head of the Administration is to be an Administrator, who will be appointed by the Governor-General in Council, preferably from among residents of the province, and will hold office for five years, before which period he can only be removed by the Governor-General in Council for cause assigned, which shall be communicated to Parliament within a week after the removal if Parliament be sitting, and if not, within a week after the commencement of the next session. The Administrator will receive a salary fixed and paid by Parliament, and such salary cannot be diminished during his tenure of office. These provisions are borrowed from the practice of the Canadian Provinces, but in other respects the Administrator has no such important position as the Lieutenant-Governors of Canada, who have to govern with the help of Executive Councils commanding the assent of Parliaments.[2] The Administrator is to be assisted in carrying on the Executive Government by a Committee of four (three to five in the original draft) members, who are to be elected by the Provincial Council at its first meeting after each general election, according to the principle of proportional representation with the single transferable vote. The members are to receive salaries fixed by the Council, and will hold office until the appointment of their successors by the Council

[1] ss. 68, 69, 78–84. The salaries of the Administrators are £2,500 in the Cape and Transvaal, £2,000 in the others.

[2] See e. g. Canada *Sessional Papers*, 1900, No. 174.

after the next general election. They need not be chosen from among the members of the Council, and if not so chosen they will, like the Administrator, be entitled to sit and speak but not to vote in the Council. Any casual vacancy will be filled by the Council if in session, or temporarily until the next meeting of the Council by the Committee itself, while if the number available at any time falls beneath the quorum required by the Committee's regulations, the Administrator is to summon a meeting of the Council for the purpose of electing members to fill the vacancies. Pending their election the Administrator shall govern alone.

Subject to the provisions of the Act all the powers, authorities, and functions vested in the Governor or Governor in Council of the Colonies or any minister by the existing law shall after the Union be administered by the Administrator, as far as such powers refer to such matters as to which the Councils are empowered to make Ordinances. In the administration of these questions the Administrator must act on the advice of the Committee, and in case of the equality of votes in the Committee the Administrator will have also a casting vote, but will not otherwise be able to override the members of the Committee. In all matters in respect of which no powers are reserved to or delegated to the Councils by the Act, the Administrator shall act on behalf of the Governor-General in Council if required to do so, but in that case he need not refer to any other member of the Executive Committee.

The Executive Committee has power with the consent of the Governor-General in Council to make rules for its procedure, and subject to the laws passed by the Parliament the Committee may appoint additional officers for Provincial affairs and lay down rules for their management and discipline.

It will be seen at once that this body is quite anomalous. In the first place, the Administrator forms an integral part of it, and though this position may be said to be comparable with that of the Lieutenant-Governors of Canada, who are also in a sense members of the Executive Councils, the

actual position is quite different. In Canada the Lieutenant-Governors do not preside in Council and do not debate with ministers, not to speak of debating in Parliament. In the South African Provinces it is contemplated that not only will the Administrator speak in Council, but he will regularly preside in Committee and debate with his advisers, or rather his colleagues. He cannot dismiss them and he cannot overrule them in any provincial matter. He must act as the majority decides. Moreover, the Committee itself will not be a political or party body; the mode of choice by proportional representation with the single transferable vote will probably secure that the members are not representatives of any one party at all: it is hoped that they will simply be a body of men chosen as the most suited for administrative work. New blood will be constantly introduced by the fact that each new Council will elect a new Committee, a power in which the Councils resemble county councils in this country, and as the Council sits but three years the Committee can hardly acquire any too great power. Again, the right to go outside the Council will open up a wider area of choice than mere selection from the Council would allow. On the other hand, the members selected from the Council will still retain their seats there and the right to vote.

The Councils[1] themselves are not to be political. In each province a Council is created consisting of the same number of members as there are elected by the province to the Legislative Assembly, except that in Natal and the Orange Free State the number of members shall be twenty-five each. The members shall be elected in the same divisions as for the Assembly, and the divisions in the Colonies of Natal and the Orange River Colony were delimited by the same Commission as delimited the divisions for the Assembly elections, and on the same basis. The qualifications for electors and members are the same as in the case of Parliamentary elections for the Lower House of the Union. The Councils shall be summoned to meet by the Administrator, who shall also be entitled to prorogue them,

[1] ss. 70–7.

but there must be a session of each Council every year, so that there shall never be more than twelve months between the end of one session and the beginning of the next session. The Council shall elect its own chairman, and make rules of procedure, which can, however, be disallowed by the Governor-General in Council. The members shall receive allowances now fixed by the Governor-General in Council at £120 a year, and shall be entitled to free speech. The Council shall last for three years, and shall not be dissolved save by efflux of time.

The Council is therefore in no sense a Parliament. Its members are indeed elected as if for a Parliament, and will be paid and given freedom of speech, but they cannot make rules which are not subject to disallowance by the Governor-General in Council, and their allowances are fixed by the same authority. Moreover, the Executive Government is not dependent on their favour : once elected, it remains in office. At the same time the Executive cannot control the Council ; it may thwart all their wishes for legislation, but it cannot be dissolved. Its real analogue is a municipal council, not a Parliament ; and like a municipal council, its legislative power is far from being extensive, though it is important as dealing with matters of everyday life.[1]

We have seen that the Union Parliament is to have full legislative power to make laws for the peace, order, and good government of South Africa. But there is also set up a subsidiary legislative machinery which is to deal with provincial matters.[2] The subjects referred to the Provincial Councils are strictly limited in number and extent ; they comprise (1) direct taxation within the province in order to raise a revenue for provincial purposes ; (2) the borrowing of money on the sole credit of the provinces with the consent

[1] The Australian states by their practically sole possession of the right to legislate in social matters (e. g. land tenure, industrial matters, &c.) preserve for the present their importance against the Federation. Factories and land come home more to the average citizen than defence, while customs—the other great branch of federal activity—is not a constant subject of legislation.

[2] ss. 85–91. Cf. *The Government of South Africa*, i. 257–66 ; ii. 152–7.

of the Governor-General in Council and in accordance with regulations to be framed by Parliament ; (3) education other than higher education for a period of five years, and thereafter until Parliament otherwise provides ; (4) agriculture, to the extent and subject to the conditions to be defined by Parliament ; (5) the establishment, maintenance, and management of hospitals and charitable institutions ; (6) municipal institutions, divisional councils, and other local institutions of a similar nature ; (7) local works and undertakings within the province other than railways, harbours, and such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work, and to provide for its construction by arrangement with the Provincial Council or otherwise ; (8) roads, outspans, ponts, and bridges, other than bridges connecting two provinces ; (9) markets and pounds ; (10) fish and game preservation ; (11) the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law or ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated ; (12) generally all matters which in the opinion of the Governor-General in Council are of a merely local or private matter in the provinces ; (13) all other subjects in respect of which Parliament shall by a law delegate the power of making ordinances to the Provincial Councils. Moreover, a Provincial Council may recommend to Parliament the making of a law relating to any matter in respect of which the Council itself cannot pass an ordinance, and in cases which must be dealt with by a private Act in the Parliament the Provincial Council may, subject to such procedure as Parliament may lay down, take evidence by means of a select committee or otherwise, and report, and on the receipt of the report or evidence, the Parliament may pass the Act without requiring the taking of further evidence.[1]

Any Bill so passed by the Provincial Council shall be presented to the Governor-General in Council for his assent, and he must declare within a month that he assents or declines

[1] Mr. (now Sir E.) Kilpin's suggestion, ibid., i. 414.

assent, or reserves the Bill for further consideration ; in the last case he must assent, if at all, within a year from the first presentation for assent. The Administrator has no veto on legislation, and though he can speak in the Council he does not vote.

The last provision secures, of course, to the Union Government full control over the legislation of the provinces. Moreover, it may be taken for granted that the control is intended to be exercised freely, and that there is no understanding that the provincial legislation should only be dealt with in so far as it contravenes the competence of the provincial legislatures. In Canada the claim has from time to time been asserted by the provinces that in all matters of provincial competence the Dominion Government must not interfere, but though the Dominion Government have admitted that in most of the cases they should not interfere with provincial legislation, they have never hesitated to affirm in principle and in practice the right of the Dominion to control legislation which runs counter to the general policy of the Dominion, even if that legislation be passed on some topic in respect of which the legislature of the province alone is capable of deciding. So for many years the railway policy of the Dominion was carried out by disallowance of provincial legislation which conflicted with it.[1] The same rule will apply in the Union, and with all the greater force inasmuch as the control of the Union over the province is generally much greater than in Canada.

It appears clear that the legislative power of the Union is not fettered by this establishment of Provincial Councils, and that its legislation is paramount to any provincial legislation. It might, indeed, be argued that the Union Parliament could not legislate for merely provincial matters, as its function is to legislate for the peace, order, and good government of South Africa. But it is clear that the only judge of what is desirable for the peace, order, and good government of South Africa is the Parliament itself, and

[1] See above pp. 739 seq., and cf. Sir W. Laurier in *House of Commons Debates*, 1910–1, pp. 2769 seq.

that to accomplish its ends it may deem that separate laws for each province are necessary. The Union Parliament can therefore legislate in any case on the same topics as the Provincial Councils, and such legislation is paramount (s. 86), and the Councils are at once placed in a hopeless state of inferiority as compared with the Canadian Provinces or the Australian States. It is true that the former, like the Councils, are liable to have their legislation disallowed on grounds of federal interest, but the provinces possess in many matters exclusive powers of legislation, and even if the Dominion can prevent their legislation having effect it cannot itself legislate on these topics. Struggles like that of Manitoba and the Dominion cannot conceivably occur between the Union and the provinces. The Australian States, again, are independent of the Commonwealth as regards the allowance or otherwise of their Acts, and the Commonwealth has as a rule only a definite sphere of legislative activity, the residuary legislative power belonging to the state, which maintains a right to legislate on almost every topic which falls within the power of the Commonwealth, though such legislation is superseded by Commonwealth legislation to the extent to which it is actually in conflict with such legislation.

Further, the provinces have a more limited sphere of power than the Provinces of Canada or the States of Australia. The Canadian Provinces have exclusive powers in such important matters as the alteration of the Constitutions of the provinces, the management of public lands (though this privilege has been in part denied to Manitoba, Alberta, and Saskatchewan), the incorporation of provincial companies, the solemnization of marriage, the administration of justice, property and civil rights, &c. It is true that many of these matters may be delegated to the Provincial Councils or may be declared by the Governor in Council to be of a local or private nature, but for these powers the Councils are dependent on the goodwill of Parliament. Even the control of and the appointment of officers for provincial purposes is made subject to the rules laid down by Parliament, whereas

the Canadian Provinces possess that power in the fullest degree. The Australian States, as mentioned above, are still better off, as they can legislate on any matter subject merely to the possibility of conflict with a Commonwealth law on the subjects, by no means very numerous, on which the Federal Parliament has legislative power.

Moreover, in all matters of finance the Union Government possesses another means of control over the provinces. No appropriation can be made save on the recommendation of the Administrator, whose warrant is also requisite for any expenditure,[1] and in recommending or issuing warrants it would appear—though it is not clear—that the Administrator will act as a Union official. Further, the provincial accounts are to be audited by an auditor appointed by the Governor in Council and paid from Union funds, who will be only removable from office by the Governor-General in Council for cause assigned, which must be communicated to Parliament within a week of the removal, or within a week after the meeting of Parliament if it be not sitting at the date of the removal. The counter-signature of the auditor shall be essential for the validity of any warrant issued by the Administrator for the expenditure of money.[2]

Though the power of the Union Government over the provinces is thus to be complete, there is no control reserved to the Imperial Government. The laws of the provinces will not be subject to Imperial disallowance, and this point is one of considerable moment, in view of the fact that the power of assent or reservation is given not to the Governor-General, but to the Governor-General in Council,[3] a rule which prevails in Canada. Now the power of the Provincial Councils extends to matters which might easily affect vitally Imperial interests, e. g. legislation differentiating against British Indians and Japanese or Chinese.[4] No doubt the control and administration of matters affecting Asiatics specially or differentially are vested by s. 147 in the Governor-General in Council, but that provision, in my opinion, does

[1] s. 89. [2] s. 92. [3] s. 90.

[4] Contrast *The Government of South Africa*, ii. 153.

not lessen the right of the provinces to legislate within the limits of their authority so as to affect Asiatics. The effect of s. 147 is indeed very obscure as regards the point. Presumably in these cases the same principle would be adopted by the Union Government as by the Dominion Government, which is ever ready to consider Imperial interests in deciding as to the disallowance or otherwise of provincial legislation, as in the case of the British Columbia anti-Japanese Acts. The matter is, however, one of great importance, as it is perfectly clear that a Governor-General could only refuse assent in Council, and, as we have seen, a Council must include ministers, so that in the event of a dispute the Governor-General could only legally refuse assent by replacing ministers by his own nominees, if he could find any prepared to aid him in his effort.

The nearest parallel to the arrangements as to the executive and legislative powers of the provinces is to be found in the provinces of New Zealand, created under the Act of 1852[1] granting a representative Constitution to New Zealand. In that case the General Assembly of New Zealand had full legislative power on all subjects, and in all its enactments could override provincial enactments.[2]

The provinces, however, had, subject to this paramount power of the General Assembly, authority to legislate on all matters of provincial interest,[3] excluding, however, legislation as regards duties of customs; the establishment of Courts of judicature, civil or criminal, except Courts for trial and punishment of offences made punishable in a summary way by the law of New Zealand; the regulation of currency, paper or money; the regulation of weights and measures; the regulation of the post office; legislation as to bankruptcy or insolvency; the erection and maintenance of beacons and lighthouses; the imposition of shipping dues; the regulation of marriages; legislation affecting Crown lands or lands to which the title of the aborigines had never been extinguished; laws inflicting disabilities or restrictions on persons of the native races to which persons of European

[1] 15 & 16 Vict. c. 72, ss. 2–31. [2] s. 53. [3] ss. 18, 19.

birth or descent would not also be subjected ; the alteration of the criminal law, except in so far as related to the trial and punishment of offences punishable in a summary way ; and the regulation of the course of inheritance of real or personal property or legislation affecting wills.

The laws passed by the Provincial Councils were to be assented to or reserved or disallowed by the Superintendent, subject to any instructions which the Governor might from time to time give him. All Bills affecting the extent of the electoral districts of the Council, or establishing new electoral districts, or altering the number of members for the districts, or the number of members of the Council, or the limits of new towns, required reservation. The Governor was empowered to disallow any Bill assented to by the Superintendent within three months after its receipt by him. The term was originally in the Bill fixed at two years, but it was reduced to three months while the Bill was passing through the Imperial Parliament, thus preventing, in view of the existing facilities of communication, any disallowance at the request of the Imperial Government, and leaving it to the discretion of the Governor what Acts should be disallowed. Similarly any reserved Bill had to be assented to within three months, or it became of no effect, and so the Governor was forced to act on his own discretion in deciding whether a reserved Bill should be allowed to come into force.

The Councils consisted of members elected by voters in the provinces who had the same qualifications as voters for the General Assembly.

The Provincial Council lasted for four years, and it could be prorogued by the Superintendent, provided that there should be a session once every year, so that not more than twelve months should intervene between the last sitting in one session and the first sitting in the next session. The Superintendent was not empowered to dissolve the Provincial Council, but the Governor had the power to dissolve it.

The position of the Superintendent was peculiar. He was elected by persons duly qualified in each province to elect members for the Provincial Councils, and he held office until

the election of his successor, who was elected as soon as possible after the dissolution or expiration of the Council. The Governor had the power to disallow any election, whereupon a new election had to take place, and at any time during the office of any Superintendent the Crown had the right to remove him from office on receiving an address signed by the majority of the members of the Provincial Council praying for his removal. The Superintendent was not assigned by the Act itself [1] any special executive authority, but that was merely in keeping with the general nature of the Act, which practically does not deal with the Executive Government at all. As a matter of fact, he had a sphere of activity somewhat similar to that of the Administrators of the South African Provinces, and clearly he would have been entitled to act on his own responsibility, subject always to the possibility of his removal if the majority of the members of the Council desired him to be removed. The power, however, of removing him was simply facultative, although in fact it could be exercised according to the rules of responsible government, and the Superintendent would thus become a sort of elective Lieutenant-Governor.[2]

As a matter of fact the principle of Provincial Councils did not work well, and was eventually abolished in virtue of an Act passed by the Imperial Parliament in 1868 and carried into effect by an Act in 1875 of the Parliament of New Zealand, under which ordinary municipal institutions were substituted for the council system.[3]

In addition to its paramount power of legislation, the General Assembly had power to constitute new provinces, to direct the number of members of which a Provincial Council should consist, to alter the boundaries of the provinces, and to alter the provisions respecting the election of

[1] The Councils used to proceed strictly on party lines, like Parliaments, and the Superintendents exercised the functions then exercised by Governors, and dismissed Ministers.

[2] It must be remembered that the Act of 1852 throughout never refers to responsible government even for the main government of New Zealand.

[3] See *Parl. Pap.*, 1876, A 2 A; the *Abolition of Provinces Act*, 1875; Imperial Act 31 & 32 Vict. c. 92.

members of the Provincial Councils, the powers of the Councils and the distribution of the surplus revenue between the provinces, provided that any such Bill required reservation for the royal assent.

It was provided that after all the revenue appropriated by Parliament or charged by the Imperial Act itself had been provided for, the surplus should be divided among the several provinces in the same proportions as the gross proceeds of the said revenue should have arisen therein respectively. The Provincial Councils had also been empowered to raise revenue within the provinces subject to the exceptions mentioned above.

It should, however, be noted that a certain degree of stability has been given to the Provincial Councils in South Africa by the requirement made at the Bloemfontein Conference for the reservation of Bills of the Union Parliament abolishing them or affecting their powers (s. 64). It is true that this requirement is not a very important one, for it merely introduces a certain amount of delay, and possibly a certain caution, in the Union Parliament, lest any step be taken which could prevent the assent of his Majesty being ultimately given to the proposed Bill. But in view of the relatively unimportant position of the provinces under the Constitution it is hard to believe that any very substantial doubt could ever exist as to the acceptance of a Bill relative to the provinces by the Imperial Government. The Union Parliament under any normal circumstances must be deemed the best judge of what legislative authority should be exercised by the provinces. It is quite possible that in fact it may allow the provinces great powers; it is more probable that it will exercise the greater part of the legislative functions of the country itself.

§ 5. The Judiciary [1]

The Colonial Conference of 1907 discussed among other things a recommendation on this head by the Prime Minister for the Transvaal, which was in favour of the establishment

[1] ss. 95–116. Cf. *Parl. Pap.*, Cd. 3523, pp. 207 seq.; Cd. 5745, p. 230.

of a single Court of Appeal in South Africa, from which no appeal should lie save by special leave to the Privy Council.[1] Before the appeals might come direct to the Privy Council of right or by special leave from no fewer than three Courts in the Cape—the Supreme Court proper, the Court of the Eastern Districts, and the High Court of Griqualand—from the Supreme Courts of the Transvaal, the Orange River Colony, and Natal, the Witwatersrand Court, the Native High Court in Natal, the High Court of Rhodesia, and the Swaziland Court. By the Act all these Courts are consolidated into one Supreme Court for South Africa, which consists of two divisions, the Supreme Court and the Appellate Division. This division includes the Chief Justice and two ordinary judges, and two additional judges of appeal who shall from time to time be assigned from any of the local or provincial divisions of the Supreme Court to the appellate division by the Governor-General in Council, but who shall still do their ordinary work whenever their services can be spared. The Supreme Courts, including the High Court of the Orange River Colony and the Court of the Eastern Districts of the Cape, the High Court of Griqualand, the Witwatersrand Court, and the several Circuit Courts, will be provincial and local divisions of the Supreme Court of South Africa and preserve their original jurisdiction plus jurisdiction in all suits in which the Union is a party or a provincial ordinance is challenged as invalid. They will also, unless Parliament otherwise provides, have jurisdiction in regard to electoral questions affecting the Parliament or the Councils.

In future appeals from the superior Courts of the old Colonies and from the High Court of South Rhodesia, from which at present appeals lie to the Supreme Courts of the Colonies—that is, in the case of the Cape, the Court of the Eastern Districts and the High Court of Griqualand and the Circuit Courts, and in the Transvaal the Witwatersrand Court—will lie only to the appellate division of the Supreme Court, save in the case of orders or judgements by a single judge on applications and motions of a minor character, or

[1] Cf. *The Government of South Africa*, i. 56 seq.; ii. 14 seq.

in the case of criminal appeals, when an appeal will lie to the provincial division, and then by special leave only of the appellate division to that division. Similarly all appeals which lie at the time of the Union to the Privy Council from any Supreme Court of the Colonies, including the High Court of the Orange River Colony, shall in future lie only to the appellate division, but the right of appeal in any civil suit shall not be limited by reason only of the amount claimed or awarded in any suit. From resident magistrates' and other inferior Courts in the provinces appeal will lie to the divisions of the Supreme Court corresponding to the superior Courts to which appeals lay before the Union, but there will be no further appeal unless the appellate division of the Supreme Court gives special leave, when an appeal will lie to that division. There shall be no appeal from the Supreme Court or any of its divisions to the King in Council, but this prohibition is not to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the appellate division to the King in Council. The Parliament may make laws limiting the matters in respect of which such special leave may be asked, but proposed laws containing any such limitation shall be reserved for the signification of His Majesty's pleasure. The appeal in Admiralty cases under the *Colonial Courts of Admiralty Act*, 1890, is, however, not affected by these provisions of s. 106.[1]

These provisions are in harmony with the recommendations of the Colonial Conference, but it is important to note that they go a good deal beyond anything which exists in the other Dominions. In the case of Canada appeals lie by right from every Provincial Court to the Privy Council, and also in every case of course by special leave. Further, the Privy Council can grant special leave to appeal from the decision of the humblest Courts in the provinces. In the case of the Dominion Supreme Court no appeal lies as of right,[2] but an

[1] The Privy Council has held that the provisions of the *Supreme Court of Canada Act* do not bar the appeal of right under this Act; see *Richelieu and Ontario Navigation Co.* v. *Owners of SS. Cape Breton*, [1907] A. C. 112.

[2] Cf. *The Framework of Union*, pp. 158, 159.

appeal lies by special leave in every case save as regards criminal appeals, where the prerogative has been limited by a Canadian Act, though it is a good deal more than possible that that Act might be held to be inconsistent with the Imperial Act 7 & 8 Vict. c. 69, s. 1,[1] and therefore *ultra vires* the Canadian Parliament. In the case of the Commonwealth appeals lie by right and by special leave from all the State Supreme Courts and by special leave from inferior Courts; from the Commonwealth High Courts appeals lie only by special leave, and in certain instances all appeals are prohibited save by the permission of the Court itself, viz. in cases involving the question of the rights *inter se* of the Commonwealth and the states or any two or more states. But even in cases of this sort an appeal could be brought by special leave from an inferior Court exercising federal jurisdiction except in the case of the Supreme Courts of the states, which are not allowed by the Commonwealth Act No. 8 of 1907 to deal with such cases at all.

In the case of the Union the right to grant special leave to appeal from any Court whatever in South Africa is apparently intended to be abolished, save as regards the appellate division of the Supreme Court, though the case of the inferior Courts which are not divisions of the Supreme Court seems to be overlooked. This rule will clearly reduce to the minimum appeals from South Africa, as the only cases which can come to it are those which have run through the Appellate Court. This proposal has no doubt advantages, inasmuch as any case which came to the Privy Council will have been reconsidered by the most authoritative opinion of South Africa, and any possibility of error based

[1] That section is devoted to allowing appeals whether of right or by special leave from any Court even if not a Court of Appeal, but it also gives the power in the case of Courts of Appeal. But it has not been acted on in criminal cases in Canada since the Act of 1888 (51 Vict. c. 43, s. 5, now *Rev. Stat.*, 1906, c. 146, s. 1025) of Canada. So it has been held by the Supreme Court of Victoria that the attempted limitation of appeals as of right under s. 231 of Act No. 1142 is *ultra vires* as repugnant to the terms of the Order in Council of June 9, 1860, which fixes the amount at £500, whereas the Act says £1,000. See *Statutes*, 1890, iv. 3232, n.

on the ignorance of the members of the Judicial Committee of Roman-Dutch law will be obviated. It is, however, a question which is not quite clear how far the words of the Bill are adequate to produce this effect, as the prerogative is not very explicitly barred except perhaps as regards the Supreme Court itself.

The judges of the Supreme Court will in future be appointed by the Governor-General in Council, and will have salaries which cannot be reduced during their tenure of office. They can only be removed from office by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.[1]

The existing judges of the Colonial Courts are all continued in their posts in the corresponding divisions of the Supreme Court, the Chief Justices becoming Judges President but retaining their titles for the rest of their term of office, and the pensions and salaries to which at present they are entitled are ensured to them. Lord de Villiers became Chief Justice of South Africa. In the case of an occurrence of a vacancy in the divisions of the Supreme Court, the Governor-General in Council, if he considers that the number of judges may advantageously be reduced, may refrain from filling up the vacancy pending the decision of Parliament. No doubt in due course advantage will be taken of this provision to reduce the numbers of judges in South Africa.

The appellate division shall be composed of the full five members in the case of an appeal from any Court composed of two or more judges; if the appeal is from a decision of a single judge, three members of the division will be a quorum, and no judge shall take part in the hearing of an appeal from a decision of his own. The Court will normally sit in Bloemfontein, but may from time to time, for the convenience of suitors, hold its sittings at other places in the Union. This provision (s. 109) is a concession to the Orange River Colony, which of course will be the seat of neither the administrative nor the legislative capital of the Union. The Chief Justice

[1] ss. 100, 101.

and the ordinary judges of appeal may make rules for the regulation of the proceedings in the appellate division, and these rules on approval by the Governor-General in Council will be binding. Similarly the Chief Justice and other judges of the Supreme Court can make rules of procedure for the provincial and local divisions which will be subject to the approval of the Governor-General in Council. Until such rules are made, the existing rules will apply to each provincial or local division, while the procedure of the appellate division will be that of the Supreme Court of the Cape.

As a result of the unification of the Courts of the Colonies, in future any provincial or local division in which an action is begun shall be entitled to order its transfer to another division if that be deemed more convenient. Again, the judgements of each provincial division can be registered in any other division and enforced by execution if necessary. The judgements of the appellate division shall be recognized throughout the Union and enforced in each province as if they were judgements of the provincial division.

The laws regulating the admission of advocates and attorneys to practise in the present Courts will apply to the admission of advocates and attorneys to practise before the provincial divisions of the Supreme Court, and the members of the provincial legal profession who have the right to practise before the divisional Courts shall be able to appear before the appellate division. There is, however, no attempt to assimilate generally the legal profession in the provinces.[1]

The moment the Union was established, all suits, criminal or civil, pending in the various superior Courts, were *ipso facto* transferred to the corresponding division of the Supreme Court of South Africa. Presumably the appeal from the judgement in the case in question would be regulated by the provisions of the Act, though the section is not quite explicit, and the effect of the Act is to alter a right possessed at the moment when the suit was initiated, possibly a right on the strength of which the suit was begun ; but in any case the Act explicitly does not affect pending appeals to the King in

[1] Cf. *The Government of South Africa*, i. 66.

Council from judgements already delivered before the Act came into operation.

The administration of justice [1] throughout the Union shall be vested in a Minister of State, who shall acquire all the powers vested in the Attorneys-General of the Colonies at the time of the Union, save that the powers as to the prosecution of crimes and offences will be vested in an officer in each province appointed by the Governor-General in Council, who shall be styled the Attorney-General of the province in question and who shall also carry out any other duties assigned to him by the Governor-General in Council. The Crown Solicitor in the Eastern Districts of the Cape and the Crown Prosecutor for Griqualand West are also continued in office.

§ 6. The Civil Service

All the officers of the public service [2] in the various Colonies at the time of the union will become officers of the Union. As soon as possible after the passing of the Act, the Governor-General in Council shall appoint a Commission [3] to make recommendations for the reorganization and readjustment of the service, and for the transfer of officers to the provinces. After the Commission has reported, the Governor-General may transfer officers from time to time to the provincial services, and pending such transfer he may with the advice of the Council place the services of Union officers at the disposal of the provinces. Special rules will, however, apply to persons under the control of the Railway and Harbour Board. After the Union is established, a permanent civil service commission shall be appointed with such powers as to appointment, discipline, retirement, and superannuation

[1] s. 139. Cf. *R.* v. *Liepschitz*, 20 C. T. R. 645.

[2] ss. 140–6. The appointment and dismissal of officers are dealt with in s. 15. They rest with the Governor-General in Council.

[3] Duly appointed in 1910. In England the offices of the four Agents-General were merged into one under Sir R. Solomon, Agent-General for the Transvaal, as High Commissioner, taking rank with the High Commissioners for Canada, the Commonwealth of Australia, and the Dominion of New Zealand. See Act No. 3 of 1911.

of public officers as Parliament may determine. Any officer who is not retained in the public service as the result of the Union shall receive the same treatment as he would have been entitled to receive on abolition of office under the Government of which he was a servant. Those who are retained shall have all their existing and accruing rights made good to them, and can retire on such pension and at such age as they could have done under the law of the Colony in which they originally served. The services of no officer are to be dispensed with simply because he does not know Dutch or English. Special provision is to be made by Parliament if necessary for the permanent officers of the Colonial Parliaments who may lose office because of the Union.

The provisions are not at all ungenerous, and are evidently designed to obviate the hostility to the Union of the great body of public servants in South Africa. None the less, the demands made upon the anxiety of public servants for the best interests of the South African States is shown by the fact that they will many of them undoubtedly lose their posts by the operation of the amalgamation of the services of the Colonies. It is true that many posts will still be preserved, but it is equally certain that there must be a very considerable total reduction, especially in the better-paid offices. At the same time, the pensions payable on abolition of office will be a small consolation to those for whom places cannot be found in the new administrations.

§ 7. Financial Provisions

The financial clauses [1] are of considerable importance and are somewhat lengthy. All revenues, from whatever sources, over which the Colonies have at the time of union power of appropriation shall vest in the Governor-General in Council.

There shall be formed a Railway and Harbour Fund into which shall be paid all revenues from the administration of railways, ports, and harbours, and such fund is to be appropriated by Parliament for the purposes of the railways, ports,

[1] ss. 117–33. See also *Audit Act*, 1911.

and harbours.[1] All other revenues are to be paid into a Consolidated Revenue Fund which is to be appropriated by Parliament for the purposes of the Union. The Governor-General in Council is to appoint as soon as possible a Commission consisting of one representative of each province, with an Imperial officer (Sir G. Murray) presiding, to inquire into the financial relations which should exist between the Union and the provinces. Until that inquiry is completed and until Parliament has taken action on it, there shall be paid annually from the Consolidated Revenue Fund to the Administrator of each province an amount equal to the sum provided for education other than higher education, in respect of the financial year 1908–9 in the estimates of the Colony and voted in 1908 by the Parliament, and such further sums as the Governor-General in Council may consider necessary for the due performance of the services and duties assigned to the provinces. During this period the Executive Committees are to submit annual estimates of expenditure to the Governor-General in Council, and no expenditure shall be incurred by any Executive Committee without the approval of the estimates by the Governor-General in Council.

Under the original draft the annual cost of raising the revenue was to form the first charge, and the annual interest of the public debts and any sinking funds were to form the second charge on the Consolidated Revenue Fund, which after defraying these charges could be appropriated by Parliament.[2] The Bloemfontein Conference gives the preference to debt charges, and apparently the cost of collection will

[1] The Board is partly a continuation and extension of the Railway Board of the Central South African Railways, partly an imitation of the commissioners who manage railways in the Australian states (*The Government of South Africa*, ii. 131–5). But characteristically full ministerial responsibility exists here. Ports were governmentally controlled in the Cape and Natal, ibid., i. 198, 199.

[2] No special appropriation is required in the case of debt charges, nor, it may be noted, for the Governor-General's salary (s. 10). The rule is the same in the Constitutions of the self-governing Colonies generally. Thus the salary of the Governor-General cannot be discussed annually in Parliament.

now need special appropriation, as has been the case in England and is the case in the Commonwealth. For a period up to two months after the first meeting of the Parliament the two funds may be drawn upon by the Governor-General in Council, but subject to that provision no moneys shall be withdrawn from either funds except under appropriations made by law.

All stock, cash, bankers' balances and securities, Crown land, public works, and all movable or immovable property, and all mining and other rights belonging to the Colonial Governments, shall vest in the Governor-General in Council, in each case subject to any debt or liability specifically charged thereon. In return the Union shall assume all the debts of the Colonies as they stood at the time of the Union,[1] subject in all cases to precisely the same conditions as exist at present. Subject to these conditions, the Union may renew, convert, or consolidate the debts.

Similarly all ports, harbours, and railways belonging to the Colonies shall vest in the Governor-General in Council. No public railway and no port, harbour, or similar work shall be constructed without the sanction of Parliament. Subject to the authority of the Governor-General in Council, the control and management of railways, ports, and harbours shall be vested in a Board of not more than three commissioners appointed by the Governor-General in Council and a Minister of State, who shall be chairman. The commissioners will hold office for five years, and can only be dismissed within that period for reasons assigned and laid before Parliament within a week after the removal if Parliament be sitting, or if not, within one week after the commencement of the next ensuing session. The salaries of the

[1] In the case of Australia the right of the Commonwealth to assume the debts of the states as they stood at federation has not yet been exercised, pending some agreement with the states as to financial arrangements on the expiration of the 'Braddon' clause as to division of customs revenue; but steps to effect this result are now being considered, and the power of the Commonwealth has been extended to include the taking over of any and every debt by Act No. 3 of 1910. For South Africa debts cf. *The Government of South Africa*, ii. 218 seq.

commissioners shall be fixed by Parliament and shall not be reduced during their terms of office.

The railways, ports, and harbours shall be administered on business principles,[1] but due regard shall be paid to the agricultural and industrial development of the Union and promotion by means of cheap transport of the settlement of an agricultural and industrial population in the inland portions of all the provinces of the Union. So far as may be the total earnings shall only be sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation, and the payment of interest due on the capital, not being capital contributed out of railway or harbour revenue and not including any sums payable out of the Consolidated Revenue Fund, in accordance with the provisions of ss. 130 and 131 of the Act, which deal with the case of loss on lines not approved by the Board and on the provision of unremunerative facilities. The amount of interest due on such capital invested shall be paid from the Railway and Harbour Fund into the Consolidated Revenue Fund. Effect is to be given to this section as soon as practicable (and not later than four years) after the establishment of the Union. In that period, if the general revenues are insufficient and there is an excess on railway and harbour earnings, Parliament may appropriate the excess for general purposes.

The Board may establish a fund out of railway and harbour revenue to be used for maintaining uniformity of rates despite fluctuations of trade. The Board shall become possessed of all balances to the credit of any Railway or Harbour Fund in the Colonies existing at the Union.[2]

Every proposal for railway, port, or harbour construction must be considered by the Board before submission to Parlia-

[1] This rule is intended to guard against the bringing of political pressure to bear on the commissioners for the construction and working of non-economic railways and in questions affecting discipline, both matters which have caused great trouble in the Australian states. Cf. *Parl. Pap.*, Cd. 3564, pp. 101 seq.

[2] Cf. *The Government of South Africa*, ii. 138–47.

ment, and the Board must report and advise whether the work should or should not be carried out. If the work is carried out despite the views of the Board, and the Board consider that the revenue from the work will not meet the costs of working, maintenance, and interest of the capital invested, it shall submit an estimate of the annual loss, which, when approved by the Comptroller and Auditor-General, will be made good from the Consolidated Revenue Fund, provided that if in any year the actual loss is less than the estimate, only so much will be made good. In calculating the loss, regard is to be had to the value of contributions of traffic to other parts of the system. If also the Board is required by the Governor-General in Council or by Parliament to provide gratuitous or unremunerative services, the amount shall be made good from the Consolidated Revenue Fund.

Provision is also made for the appointment of a Controller and Auditor-General by the Governor-General in Council.[1] He shall hold office during good behaviour, and can only be dismissed by the Governor-General in Council on an address from both Houses of Parliament, though when Parliament is not sitting the same authority may suspend him on the ground of incompetence or misbehaviour, and must confirm the suspension unless an address is presented from the two Houses of Parliament in the next session praying for his restoration to office. Pending the decision of Parliament his duties were appointed by the Governor-General in Council, and are now regulated by the *Audit Act*, 1911.

The diminution of prosperity to Pietermaritzburg and Bloemfontein from their ceasing to be the seats of Government in their respective Colonies is to be made good in part by a grant from the Consolidated Revenue, for a period not exceeding twenty-five years, of the sum of 2 per cent. per annum on the municipal debts as existing on January 31,

[1] The provision for an Auditor is not usual in Colonial Constitutions, though, of course, Colonial Acts regularly provide for the post and its powers, and the Acts are based on the same principles as the Union Act, s. 132. See Canada *Revised Statutes*, 1906, c. 24; Commonwealth *Audit Acts*, 1901, 1906, and 1909; *The Government of South Africa*, i. 320.

1909, and as ascertained by the Comptroller and Auditor-General.[1] The Commission appointed to decide the financial relations of the Union and Provinces may also award compensation to the municipalities of Cape Town and Pretoria if it considers it desirable, such compensation not to exceed 1 per cent. for twenty-five years on their municipal debts at January 31, 1909. One-half of any such grants shall be applied to the redemption of the debts of the towns concerned, so that at the end of the period the principal sums due should be substantially diminished. At any time after the payment of the tenth annual grant to any town the Governor-General in Council, with the approval of Parliament, may withhold or diminish the grant made.

More important is the fact that the Transvaal has decided to make large concessions to both the Cape and Natal on railway matters. For years the most burning internal question in South Africa has been that of the division of traffic between Delagoa Bay, Natal, and the Cape ports. Not only has the Delagoa Bay route the natural advantage of distance from the mining centre of the Transvaal, but the mining industry on which the whole greatness of the Colony rests is vitally interested in preserving access to the recruiting ground for native labour for the mines existing in the Portuguese territories. Hence one of the first actions of Lord Milner in the administration of the Transvaal was to conclude with the Government of Mozambique an agreement for the right of access to that source of labour in exchange for the maintenance to the port of the advantage over the Cape and Natal ports which it enjoyed while the Transvaal was a Republic hostile to the British Colonies, through the fixing of the railway rates for the transit to the port from the mining area. Naturally the other Colonies resented this

[1] s. 133. By ss. 18 and 23 Pretoria becomes the administrative, Cape Town the legislative, capital. The arrangement is illogical and a compromise; it is neatly criticized in *The Empire Review*, xviii. 117, and it may be added that the official residence of the Governor-General is at Johannesburg. Rhodes's house, Groote Schuur, is set apart for a residence for the Prime Minister, but his official work will mainly be done at Pretoria.

position, and as naturally the Transvaal was not prepared to yield so long as it required native labour.[1] It was therefore of great importance that the Transvaal was able to promise to the two Colonies concerned one-half of the trade, 30 per cent. to Natal and 20 to the Cape, while the rest goes to Delagoa Bay. The proportions recently in force were 24 per cent. to Natal and 12 per cent. to the Cape, so the change was a popular one. This concession by the Transvaal to Natal, coupled with the grant by the Cape of the right to an excessive representation of seventeen members in the House of Assembly, instead of the twelve to which it is qualified by the population, were designed to render that Colony disposed to accept unification instead of federation, to which the most prominent Natal statesmen have leaned.

There is not much of constitutional interest in these financial clauses. They avoid any such difficulty as faced the Commonwealth, that of settling the proportions of revenue from customs to be assigned to the central and the state Governments, a problem which seems almost incapable of satisfactory settlement. On the other hand, it seems very doubtful whether the new Constitution will fulfil the hopes of the framers for economy ; it appears that so impartial a judge as Mr. Merriman has expressed himself with hesitation on this topic. The attempt to take the railways out of direct political management is noteworthy, as there is no doubt that in the Dominions generally there is too much tendency for the Government to construct lines—as has notoriously been done in the Cape—on purely partisan considerations, but its success is doubtful.

There is to be free trade throughout the Union, but otherwise the existing tariffs and excise duties will remain in force (s. 136).

[1] See *Parl. Pap.*, Cd. 3564, pp. 20 seq. The arrangement as to traffic was made binding on the Union Government after the Bloemfontein Convention as s. 148 (2) of the Act ; see Cd. 4721, p. 3. Its position in that clause is curious, but natural. It was only rendered possible by a new Convention in 1909 with Mozambique, Cd. 4587 (Art. xxiii).

§ 8. Treaties and Naturalization

It is expressly provided by the Constitution that the Union shall become responsible for any treaties binding on the provinces before unification,[1] and the agreement of February 2, 1909, between the Cape, Natal, and the Transvaal as to railway traffic is treated as a treaty.

Under the Commonwealth Constitution there is no corresponding provision. It has been held by the Commonwealth Government, though the argument has not been accepted, and could not be accepted, by the Imperial Government, that all treaties binding on the states of the Commonwealth before federation ceased *ipso facto* to be binding at all by federation. This argument, which is based on the analogy of independent states, and is invalid in the case of parts of one Empire, has not been accepted by the Imperial Government, and in practice the Government of the Commonwealth has accepted the position that it remains bound in respect of the Colonies affected by treaties concluded before federation.[2]

In the case of Canada, the matter was settled once and for all by the *British North America Act*, s. 132 of which provides that the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any provinces thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries. Though this section does not expressly state that the treaties which affected the Colonies before federation shall be binding on Canada in respect of provinces so affected after federation, it has no meaning except on this understanding, and the Canadian Government have accepted the position that they

[1] s. 148.

[2] See *Parl. Pap.*, Cd. 3826, p. 6; Cd. 4355, p. 12. The Navigation Bill as actually introduced into the Senate accepted liability (s. 414) for all treaties binding on any state so far as that state was concerned, and the validity of the Queensland adherence to the Japanese treaty of 1894 was recognized by notice being given of the termination of that adherence.

are bound in respect of any treaties which were binding on the Colonies before federation so far as regards such Colonies as were bound.

It was therefore held that the Commercial Treaties of 1862 with Belgium, and of 1865 with the North German Confederation, bound Canada and prevented her giving preferential treatment to Great Britain, with the result that these treaties were in due course denounced after discussion of their provisions at the Colonial Conference of 1897.[1]

It may be taken, therefore, as clear that the obligations of the Union in respect of the treaties will apply only with regard to the provinces which as Colonies were actually bound by the treaties. It is indeed obvious that though the Imperial Act might extend the obligation of the treaties over the whole Union, the advantages of the treaties could not be claimed by virtue of an Imperial Act without the consent of all the Powers with which treaties existed.

In the case of the Union, as the Parliament of the Union has a paramount legislative power on every subject, no difficulties could arise, and the Union will no doubt not consult the Provincial Councils or the Governments in any way in deciding whether to adhere to any given treaty or not.[2]

The Union will also take its place beside Canada and Australia as being entitled to voting power at international conferences on subjects not political. It has already adhered as a whole to the Radio-Telegraphic Convention and the Convention against the use of white phosphorus in matches. Already under the Wireless Telegraphy Convention one vote is assigned to the Colonies adhering (excluding Orange River Colony), and at the last Postal Conference the Cape vote was really exercised on behalf of the Colonies collectively.[3]

It is expressly provided by s. 138 of the Act that all

[1] See *Parl. Pap.*, C. 7553, pp. 53 seq.; Cd. 1630. The treaties were concluded before federation and before the admission to federation of the later acquired provinces.

[2] For the cases of Canada and the Commonwealth, see below, Part V, chap. v.

[3] Cf. *The Government of South Africa*, i. 220.

persons naturalized in any part of the Union shall be deemed to be naturalized in the whole of the Union. This provision is of obvious convenience and of value ; it has no parallel in the North America Act or in the Commonwealth Constitution Act, but in both these cases subsequent legislation, under the power to legislate for naturalization given to the Dominion [1] and the Commonwealth [2] by the Constitution, has brought about a similar state of affairs, and naturalization is granted under Acts of the Commonwealth and the Dominion which make it apply to the whole Dominion and Commonwealth respectively. The effect of such naturalization was, however, in the case of the Union under the original draft Constitution only extended in the case of Europeans, and the somewhat anomalous and unsatisfactory position still remained that natives naturalized in any of the provinces would continue only to be British subjects in the provinces in question. This result was unfortunate and unsymmetrical, and indeed it was in reality a contravention of the whole spirit of the Union. The creation of a Union was intended to substitute for four separate Colonies a single Colony, and to perpetuate separation of the provinces by this provision was contrary to the whole principle of the Union itself. It is difficult to see what practical advantage could have been gained from a situation which was legally anomalous,[3] and fortunately the clause was amended at the Bloemfontein Conference by the omission of the word ' European ', and a uniform naturalization law was passed by the Union Parliament in 1910 by Act No. 4.

§ 9. Entrance of New Provinces and Territories

Provision [4] is made upon addresses from the Houses of the Union Parliament for the future entry into the Union of the territories administered by the British South Africa

[1] *British North America Act*, 1867, s. 91 (25). See now *Revised Statutes*, 1906, c. 77.

[2] *Commonwealth of Australia Constitution Act*, 1900, Const. s. 51 (xix). See *Naturalization Act*, 1903.

[3] Cf. also *The Government of South Africa*, i. 157 seq.

[4] s. 150. Parliament may also (s. 149) at the request of any Provincial

Company, on such terms and conditions as to representation and otherwise as are in the addresses expressed and approved by the King, and the provisions of any Orders in Council in that behalf shall have effect as if they had been enacted by the Imperial Parliament.

This clause applies to the territories under the Government of the British South Africa Company, viz. Southern Rhodesia, and North-eastern Rhodesia and Barotzeland—North-western Rhodesia, now amalgamated into one. It would probably be impossible to include them forthwith in the Union, inasmuch as the rights of the Company must be in some way disposed of before the territories can be part of the Union.

The position is somewhat analogous to that of the Hudson's Bay Company as compared with the Dominion of Canada before the amalgamation in 1870, when the rights of the Hudson's Bay Company were formally bought out by the Canadian Government. Presumably in the long run a similar course must be adopted in South Africa, and the British South Africa Company must receive some compensation for the moneys expended by them in establishing British rule in Rhodesia.[1]

The mode of procedure is similar to that adopted in the case of Canada ; [2] the exact terms on which the incorporation is to take place will be laid down in the Order in Council, and the Order in Council will then have the same effect as an Imperial Act. Presumably, therefore, it will not be possible for the Union Parliament to amend the provisions of the Order in Council, for the power of alteration of the Constitution given in s. 152 applies only to the provisions of the Union Act itself, and does not apply to the provisions of any other Imperial Act, and the Order in Council is not incorporated in the Union Act, but is given the force of an Imperial Act.

Council or Councils affected alter the boundaries of any province, divide a province into two or more provinces, or form a province out of existing provincial areas.

[1] Cf. Report of B. S. A. Company for 1908.

[2] Cf. Wheeler, *Confederation Law of Canada*, pp. 755 seq.

This point, however, is not without difficulty, inasmuch as it would create a difference between the position of the original provinces, whose relations to the Union are subject to alteration by the Union Parliament, and provinces which subsequently joined, and whose relations to the Union would apparently be beyond the control of the Union Parliament, and possibly the clause may have been borrowed without adequate consideration from the Canadian Act. The clause itself could be varied by Parliament, and so the relation of the provinces might perhaps thus be altered.

On the other hand, this difference in treatment is not without justification in consideration of the fact that the character of the terms offered would probably add an inducement to any territories not at first included in the Union to join the Union.

Separate provision is made by s. 151 with regard to the transfer to the Union of the government of any territories, other than the territories administered by the British South Africa Company, of or under the protection of His Majesty, inhabited solely or in part by natives, which may be transferred by His Majesty, with the advice of the Privy Council on addresses from the Houses of Parliament of the Union.[1]

Upon such transfer the Governor-General in Council may undertake the government of the territory upon the terms and conditions embodied in the schedule to the Union Act.

That schedule is an important and remarkable document, and its inclusion is without precedent in either the Canadian or Australian Federation Act.[2] It lays down a definite set

[1] For their government in such a case, see Part V, chap. iii, § 5. It was proposed by Mr. Keir Hardie that there should be inserted a provision that the assent of the territory should be obtained and the operation of the clause be suspended for ten years, but this was negatived; see *House of Lords Debates*, ii. 867–70; *House of Commons*, ix. 1643 seq.

[2] In Australia Papua has been transferred to the Commonwealth with its consent by the Imperial Government without conditions, and its administration is provided by the *Papua Act*, 1905, passed in virtue of 63 & 64 Vict. c. 12, Const. s. 122, by the Commonwealth Parliament. Norfolk Island will perhaps ultimately be transferred; in both cases the action is taken by the Imperial Government in virtue of Imperial Statutes. It is not, however, clear that the Crown can transfer the island without

of conditions for the government of the native territories which may be transferred, viz. Bechuanaland Protectorate, Basutoland, and Swaziland. These conditions will be dealt with fully in a later chapter.

In all probability the procedure of including these provisions in the schedule to the Act, which was due to the wishes of the Imperial Government, secures a more satisfactory settlement of the terms of transfer than would be arrived at if the matter were left for negotiation afterwards between the Union and the Imperial Government. As part of the Union Act, the provisions will represent a compromise under which it may be expected that the interests of the territories will be at least as adequately provided for as could be done later.

At present the territories in question are administered by the Imperial Government through the High Commissioner for South Africa, who alone possesses legislative power in those territories. They are held on different titles: Bechuanaland is a Protectorate, and the power of the High Commissioner is theoretically derived from the *Foreign Jurisdiction Act*, 1890.[1] Basutoland is a Colony by cession, and the power of the High Commissioner rests on the royal prerogative to legislate for a Colony by cession or conquest. Swaziland was a Protectorate of the late South African Republic in which *de facto*, if not *de jure*, the South African Republic had before the annexation acquired full legislative power, and the High Commissioner legislates for Swaziland by virtue of the authority thus acquired by the South African Republic and transferred, on annexation of the Transvaal, to His Majesty.[2] In each case Orders in Council have been

a fresh Act; see 18 & 19 Vict. c. 56, s. 5, which seems to contemplate continued government under the authority of the Queen in Council. Cf. *Parl. Pap.*, C. 8358. In 1880 all North America not already Canadian was granted to the Dominion by Order in Council of July 31; for the legal authority for the act, see the *Colonial Boundaries Act*, 1895.

[1] Possibly also in part as a Colony by conquest or cession; *Reg.* v. *Jameson*, [1896] 22 B. 425. But cf. the (unreported) Privy Council judgement in *R.* v. *Styles*, January 27, 1899; *Rex* v. *Crewe*, *ex parte Sekgome*, [1910] 2 K. B. 576.

[2] Formally the power is exercised under the *Foreign Jurisdiction Act*, 1890. Cf. *The Government of South Africa*, i. 36, 37; *Parl. Pap.*, H. C. 130, 1905.

issued under which the administration is carried on, and the High Commissioner legislates by proclamation.

§ 10. The Amendment of the Constitution

As is natural in the case of a Constitution which is frankly not in any real sense federal, the Act does not restrict in any substantial manner the Parliament's power to alter the provisions of the Constitution. It is especially laid down in s. 152 that Parliament may by law repeal or alter any of the provisions of the Act, provided that no provision thereof for the operation of which a definite period of time is fixed shall be repealed or altered before the expiration of such period, and also provided that no repeal or alteration of the provisions of the section itself or of ss. 33 and 34 relative to the numbers of the members of the Legislative Assembly, prior to the expiration of ten years or until the total number of members of the Assembly has reached 150, whichever occurs later, or of the provisions of s. 35 relative to the qualifications of electors to the House of Assembly, or of s. 137 as to the use of languages, shall be valid, unless the Bill containing the alterations is passed at a joint sitting of the Houses, and at its third reading by not less than two-thirds of the total number of members of both Houses. The section is well worded, as it obviates the possible evasion of its spirit by the alteration of the section itself. For example, the Queensland *Constitution Act* of 1867 intended to provide a safeguard against the alteration of the composition of the Legislative Council by providing that any Act relative to it required to be passed by a two-thirds majority, but it omitted to provide that the clause itself should only be altered by a two-thirds majority, so that in 1908 the Government had no difficulty in effecting their purpose by repealing by ordinary majorities the offending clause[1] and so dealing with the matter by ordinary majorities. On the other hand, the provisions

[1] Act No. 2 of 1908. The Act was protested against on this ground in the Legislative Council. But exactly similar circumstances occurred in 1857 in New South Wales. See Queensland *Parliamentary Debates*, c. 165 seq.

of the Commonwealth Constitution for the amendment of the Constitution require the assent of the states affected to such alterations as affect the proportionate representation of the state in either House or its limits, &c., or in any manner affect the provisions of the Constitution in relation thereto, and thus the provision for amendment itself can only be amended out of existence with the consent of the state in question.

The only other provision affecting the amendment of the Constitution in the first draft was that contained in the schedule which forbids amendment of the schedule unless the Bill for amending it be reserved. The position was thus in strong contrast with the condition of affairs either in Canada or in Australia.

In the case of Canada the Constitution is regarded as not being liable to alteration except in a certain number of minor points, under which power of alteration is expressly given by the *British North America Act*, 1867, save by an Act of the Imperial Parliament itself. The reason for this is, as was recognized in 1907,[1] when the question of the alteration of the subsidies payable to the provinces was under consideration, that the Act of 1867 is of the nature of a quasi treaty between the provinces which then joined, and this provision should therefore only be modified by an external authority, and not by an authority like the Federal Parliament created by the Act itself. It does not appear that there is any desire in Canada to alter the position in this regard, which must be considered as a satisfactory safeguard for provincial interests against any possible encroachment by the Federal Government.

In the Commonwealth[2] the desire for immunity from external interference has led to a curious compromise; the

[1] See Colonial Office letter, June 5, 1907, printed in British Columbia *Sessional Papers*, 1908, C. 1. The suggestion in *The Framework of Union*, p. 196, as to the Parliament's power of alteration is untenable.

[2] 63 & 64 Vict. c. 12, Const. s. 128. The idea that the Imperial Parliament has given up its own power of alteration is, of course, untenable (cf. ibid., p. 197; B. Holland, *Imperium et Libertas*, p. 184).

Act can indeed be altered by the Federal Parliament, but only with the assent of the people of the Commonwealth, and the provisions require that any proposed law for the alteration of the Commonwealth must be passed by an absolute majority of each House of Parliament and must be submitted in each state to the electors not less than two nor more than six months after its passage through both Houses. If in a majority of states a majority of electors voting approved the proposed law, and if a majority of all the electors voting also approved the proposed law, it would then be presented to the Governor-General for the royal assent. Some laws, however, require still further approval than this. No alteration diminishing the proportionate representation of any state in either House of Parliament, or the minimum number of representatives of a state in the House of Representatives, nor any clause diminishing or altering the limits of a state, or in any manner affecting the provisions of the Constitution in relation to the state, shall be allowed, unless the majority of the electors in the state voting under the Act approve the proposed law.

In the case of a deadlock between the two Houses on a proposed constitutional alteration, if the House [1] which has passed the Bill passes it again after an interval of three months in the same or the next session, and the other House again rejects it, the Governor-General may submit the law to the voters in the states, when the procedure is the same as if the law had been passed by both Houses with the requisite majority.

The ordinary procedure has already been adopted in one case in 1907,[2] when by an Act other provision was made for the date of election of senators ; on that occasion the requisite majorities were obtained in every state without difficulty. But to carry any substantial alteration in this elaborate procedure would probably be a matter of considerable

[1] That either House can force a referendum with the Government's consent is noteworthy. Deadlock provisions in ordinary legislation give the power only to the Lower House.

[2] Commonwealth Act No. 1 of 1907.

trouble, as was seen in 1910 when the proposal to alter the financial provisions of the Act were rejected at the referendum, though the Act to enable the Commonwealth to take over all the debts of the states was accepted and became law as Act No. 3 of 1910, while in 1911 two referenda failed.

In the case of the Union, as no real attempt is made at a federation there would appear to be no objection to the power of simple alteration, which is in keeping with the existing practice in the Colonies of South Africa. In Natal and the Cape [1] constitutional alterations needed no special form of legislation whatever, and the only requirement in the case of the Transvaal and the Orange River Colony [2] was that the Bills for such alterations must by law be reserved. The only need for special provision arises, therefore, from the desire to make certain parts of the Constitution especially sacred, such as the representation of the provinces in the Assembly, the use of the Dutch language, and the Cape native vote. The equal representation of the provinces in the Senate is not subjected to provincial control.

Further, of course, the restriction imposed on the Transvaal and Orange River Colony Legislatures as to legislation affecting differentially natives, or allowing the immigration of indentured coloured labour and the temporary withdrawal from their power of land settlement, must disappear with union.[3] It should, however, be noted that the Imperial Government thus surrenders a good deal, for the legislation of the provinces will be wholly removed from its direct control.

While, however, the first convention was prepared to leave the amendment of the Constitution to Parliament subject

[1] Cf. *The Government of South Africa*, i. 444, 448, 449 (on pp. 443, 451, the case of Newfoundland is overlooked).

[2] Ibid., p. 452. The theory there and elsewhere expressed that the legislature cannot amend the letters patent constituting the office of Governor is quite erroneous.

[3] See *Hansard*, ser. 4, clxvii. 1064 seq. The broader view of such questions natural to the Union is seen in the immigration Bill of 1911 of the Union, with its abandonment of nominatim discrimination; see *Parl. Pap.*, Cd. 5579, and cf. Cd. 5363.

only to the slight restraints above enumerated, the Bloemfontein Conference resulted in the adoption of a clause (s. 64) providing for the reservation of any Bill altering the provisions of the Constitution (ss. 32–50) relating to the composition and powers of the House of Assembly, and of any Bill abolishing Provincial Councils or abridging their powers save as provided in s. 85 of the Constitution itself. This alteration was in the main due to two causes. In the first place, the supporters of the principle of 'one vote one value' were determined, after their efforts to rescue the principle from the onslaught of the Cape Parliament, which suggested a statutory preference of 15 per cent. in favour of sparsely populated districts,[1] to do all that was possible to safeguard absolutely their principle, and so adopted the requirement of reservation. In the second place, the Natal delegates were desirous of securing the position of the Provincial Councils as far as practicable and therefore provided for the stereotyping of the existing arrangements by requiring the reservation of any Bill altering them. Even so the possibility of altering the Constitution remains very great, and the Union Parliament is really in a stronger position than any Parliament save probably that of New Zealand and that of Newfoundland, which of course are simple unified Colonies with no complicated questions of two races of equal civilization and equal resources.

[1] The principle of proportional representation was sacrificed as far as concerned the Lower House of the Union Parliament in order to secure the retention of that of equal electorates. There were, however, strong practical objections to it: see Sir H. de Villiers's speech at Bloemfontein on May 11 (*Cape Times*, May 12, 1909).

PART V. IMPERIAL CONTROL OVER DOMINION ADMINISTRATION AND LEGISLATION

CHAPTER I

THE PRINCIPLES OF IMPERIAL CONTROL

§ 1. Control over Dominion Administration

The control which can be exercised by the Imperial Government over administrative matters in a Colony is small and indirect. It is always indeed possible for the Imperial Government to instruct the Governor to pardon a prisoner or to refuse pardon, and such a power might conceivably be used for the purpose of effecting some Imperial end contrary to the wishes of a Colony. Or again, the Imperial Government could refuse to allow a Governor to perform some action of which it disapproved—for example, the signing of a warrant [1] or a licence or a contract, or the issue of a grant, or the approval of regulations under an Act and so forth. An example of such control existed in an interesting form for many years on the treaty shore of Newfoundland, where the Governor was instructed by the Imperial Government not to issue any land grant which did not contain a provision for the reservation of the French rights on the treaty coast. Or again, it might be conceived that a Governor might be forbidden to assent to some administrative act, such as the deportation of a native chief, which would not be legal without his assent. The possibilities are numerous, but there are few really good examples of

[1] e.g. in the Transvaal case in 1910 (see *House of Lords Debates*, vi, 401 seq.) the Colonial Office might have prevented the payment objected to by refusing to allow the acting Governor to sign the needful warrant.

action independently of ministers, for the Governor has no other person to fall back on to carry out his will. In 1861 the Governor of New South Wales did indeed himself seal a grant under instruction from the Imperial Government to settle a long outstanding dispute which had commenced in times when the Imperial authorities controlled the land policy of the Colony, but his action was heartily condemned by the Legislature.[1] Governor Sir William Macgregor in 1907 was compelled to take steps himself to secure the publication of the Imperial Order in Council regarding the fisheries in Newfoundland, the Colonial Secretary, who was Prime Minister, declining to do the work. Again, on Imperial grounds the Governor of Natal was instructed in 1906 to put off executions of certain natives, but the result was the resignation of the Ministry, and the Imperial Government withdrew the instruction on hearing further and better details of the transaction, which showed that the natives had had a full and fair trial.[2]

There are of course other cases, and it is always possible that a Governor may have to do what Sir Bartle Frere did in 1878, in Imperial interests dismiss a Ministry,[3] and appeal to the constituencies for a verdict in his favour. At the same time it must be admitted that that was an extreme case.

In a few cases the Imperial Government has clearly used its instrument, the Governors, to secure a change of domestic policy in the interests of the Empire as a whole. The Governor-General of Canada, Lord Monk, was extremely active in pressing the question of federation on his ministers, and the records of federation show how far he deemed himself entitled to go in expostulation with them on their slow tactics.[4] The Lieutenant-Governors of the Maritime Provinces also did their best, and in one case, that of New Brunswick, the acceptance of federation was proximately due to the action of the Lieutenant-Governor in getting rid of the anti-confederation Ministry. He did not dismiss

[1] New South Wales *Legislative Assembly Votes*, 1861, i. 58, 416, 647–743.
[2] Above, pp. 291 seq.
[3] *Parl. Pap.*, C. 2079.
[4] Cf. Pope, *Sir John Macdonald*, i. 291 seq.

them, but he gave a reply in favour of federation to an address from the Legislative Council without taking their advice. It is true that the act was not deliberate, but he could have awaited their advice, and the Ministry in indignation resigned on April 13, 1866, leaving the way open to a new Ministry which declared for federation—a piece of very bad parliamentary tactics.[1]

Lord Carnarvon was at the Colonial Office during the decision of the question of federation, and it was perhaps his connexion with the Canadian settlement which resulted in another curious case of proposed Imperial interference with matters of local concern which occurred in the case of the Cape in 1875. The Imperial Government were at that time extremely anxious to secure a federal union between the British Colonies in South Africa and the two Dutch Republics of the Transvaal and the Orange Free State. The Upper House of the Cape was in favour of the proposal, but on the other hand the Lower House was distinctly opposed to it, and the opinion in the Colony seemed to be in favour of the sentiments of the Upper House. The matter was complicated by the fact that the Upper House was elective, and therefore had some claim to be regarded as expressing the will of the people as well as the Lower House. It was accordingly suggested [2] by the Imperial Government that the Governor should take the step of dissolving the Lower House in the hope that a new set of elections would result in the return of a majority in the Lower House in favour of the proposal for negotiations for union. The Governor, however, reported against the proposal.[3] He admitted that a majority in the Legislative Council, and an apparent majority in the country, might be deemed a ground for thinking that the dissolution of the Lower House would result in the return of a House favourable to the proposals. But he considered that this was really doubtful, that the opinion of the country

[1] See Pope, *Sir John Macdonald*, i. 296, 297; Hannay, *New Brunswick*, ii. 248.

[2] See Lord Carnarvon's dispatch of October 22, 1875; *Parl. Pap.*, C. 1399, p. 27. [3] See his dispatch of November 24, 1875; ibid., p. 52.

was by no means clear, and he deprecated the disadvantages of such a strong step as a dissolution of the Legislature for the purpose of carrying out what was really an Imperial policy. The Secretary of State acquiesced in his view, and agreed that it was not desirable to attempt to bring about a change of feeling by a dissolution of the Lower House.[1] But in that case it appears that the Ministry was assumed by Lord Carnarvon to be in favour of a dissolution in the circumstances, and that he did not necessarily contemplate so strong a step as a dissolution in the face of the Ministry. It is clear, however, that the Governor[2] thought that this was meant, for he referred to the idea as being 'an attempt to turn out a Ministry supported by a large and increasing majority for the purpose of dissolving Parliament on a question of Imperial policy'.

Still, Sir Bartle Frere's action remains as a precedent, but a risky one, and the circumstances were so peculiar that there is no special likelihood of their recurring. Still, obviously in the case of deadlock between the Dominion and Imperial Governments it might be necessary to try an appeal to the people before the Imperial Government made up its mind to yield, or in the alternative to insist at all costs on getting its way. If such an appeal took place, it must be remembered that there would be a good deal of responsibility on those who resisted so extreme an expression of Imperial interest.

Fortunately all these risks of conflicts become less and less when time goes on, and the Dominions become greater and greater: the Ministry of Natal might resign when it was in a difficulty with the Imperial Government: it is hardly to be thought that a statesman in a great Dominion would have recourse to any such action in case of a difficulty with the home Government. He would no doubt review the whole situation, reject in his own case what seemed to him perhaps to go beyond what was essential, and then address the home Government with the assurance that he would find a suitable

[1] *Parl. Pap.*, C. 1399, p. 53.

[2] See also Molteno, *Sir John Molteno*, ii. 40 seq.

via media which would reconcile the interests on either side. Moreover, the existence of the great Dominions will more and more tend to produce a definite change in their Imperial relations which will lessen risks of conflict. It will be seen in the following discussion of the Imperial control of the legislation of the Dominions that the control steadily ceases to be coercive, and becomes the control which results from discussions between those with equal interests and rights which can be reconciled with justice to both sides.

§ 2. Control over Legislation: Mode of Exercise

The control over Dominion legislation is exercised in two ways, either by the reservation of Bills or some method tantamount to reservation, such as the insertion of a suspending clause, or by the completion of legislation in the Dominion and disallowance by the Crown. It is also no doubt possible for the Governor to withhold his assent to a law, and it is too much to say that it will never be done.[1] But such refusal would be based normally on ministerial advice, and the problem of the duty of a minister when his ministers advise him not to assent to a Bill which has passed both Houses is a serious one: the question has not often been raised, but in December 1877 the Governor of New Zealand was advised by the Premier not to assent to the Land Act passed in the session of Parliament which had just expired. The Bill had been introduced by the late Government, but ministers had taken it up for a time, but ultimately as passed it contained various amendments with which they were not satisfied, and they decided to ask the Governor to refuse his assent. The Governor declined to do so, thinking that the Ministry should have taken upon itself the responsibility for securing the defeat of the Bill in the House, and that he could not well decline to ratify the decision of the Legislature. The

[1] Cases have occurred (e.g. in Western Australia as to Act No. 30 of 1902) where ministers have procured the occurrence of delay on presenting a Bill for assent after passing the Houses, but such action is clearly improper. The Bill should be presented forthwith, and the only delay in delivering a decision must be that taken by the Governor himself to make up his mind.

Premier at first refused to sign the formal recommendation for assent, but later did so. It is clear that the conduct of the Governor was constitutionally justified, and he was informed by the Secretary of State in a dispatch of February 15, 1878,[1] that he had acted properly—but hardly because the advice was unconstitutional: there had arisen one of those cases where the ministers have a perfect right to advise, and the Governor should follow their advice unless he thinks that if he refuses he can obtain other advisers who will assume full responsibility for and defend his action, and on this occasion the Governor no doubt realized that the action of the Ministry would be so unpopular that their resignation would be followed by the return to power of the opposite party. The power has never yet been used at home, but it has been threatened to use it in one case of a private Bill unless the promoters allowed adequate opportunity of the consideration of objections by the Government department concerned, and the use of the refusal of the royal assent on the advice of ministers seems clearly proper in a suitable case like that,[2] despite Mr. Asquith's explicit language in debate on February 21, 1911, on the Parliament Bill. The power has been used several times in Canada in the case of the provinces, as by Lieutenant-Governor Archibald, to veto Acts which have passed, but which clearly contained some serious legal flaw which would have rendered their acceptance undesirable. It has also been proposed to use the refusal of assent as a method of Dominion control, but it is preferred to use the plan of reservation, and an Imperial officer would certainly be unwise to thrust himself into the invidious position of refusing assent[3] when he can avoid all difficulty by transferring the responsibility of the decision to the Imperial Government, besides avoiding the trouble which will

[1] New Zealand *Gazette*, 1878, p. 912; *Parl. Pap.*, 1878, A. 2, p. 14.

[2] Todd, *Parliamentary Government*, ii. 398; Lowell, *Government of England*, i. 26; *Hansard*, ser. 3, cli. 586–9, 691–3, 797, 798 (Victoria Station and Pimlico Railway Bill in 1858).

[3] Cf. the dispute regarding Mr. Dunsmuir's refusal in 1907 to assent to the British Columbia Immigration Bill, *Canadian Annual Review*, 1908, p. 537.

have been caused if it turns out that the Imperial Government are able after all to assent to the Act, whether as it is or as amended at a subsequent session of the Legislature.

The question was raised with regard to the refusal by Mr. Dunsmuir of his consent in April 1907 to the Asiatic Exclusion Bill of the Legislature of British Columbia in that year.[1] It appears that the Secretary of State at Ottawa telegraphed to Mr. Dunsmuir before the refusal, saying that the Premier, Mr. McBride, had informed him that the Bill would not be assented to, and asking if he could rely upon that. The Lieutenant-Governor replied that he could, and when the Bill was presented to him for assent he refused it. A great dispute arose as to whether he had done it on his own responsibility, which the Opposition in the Legislature said was unconstitutional, or whether he had done it on the advice of ministers, in which case the Opposition claimed that ministers should accept responsibility, or whether he had done it on the instructions of the Secretary of State, and the Secretary of State denied that he had given any instructions. On the other hand, the Prime Minister denied that he gave any such advice, and it seems clear that there was some serious misunderstanding on the part of the Prime Minister and the Secretary of State, and of everybody concerned in the matter, but it was agreed in the discussions in the Legislature that if the Lieutenant-Governor had done it either on the instructions of the Secretary of State or on the advice of his ministers, his action was proper, but that he should not act on his own responsibility.[2] The official Canadian view is that refusal of assent, like reservation, is never legitimate save on explicit instructions.[3]

[1] See *Canadian Annual Review*, 1907, pp. 610 seq. ; 1908, pp. 537 seq.

[2] A Governor should certainly not act on his own judgement in the matter, and it is perfectly clear that the Secretary of State's telegram was equivalent to an instruction.

[3] See *Provincial Legislation*, 1867–95, pp. 77, 105, 763, 807 seq., 915, 1018, 1048, 1225, &c. For a discussion whether a Bill which contained mistakes should be refused assent or repealed by a Bill passed the same session, see Canada *Senate Debates*, 1910–1, pp. 445 seq. The latter course was adopted.

As between the power of reservation by the Governor or disallowance by the Imperial Government there is not very much to be said : it was argued by Mr. Blake in his famous memorandum of 1876,[1] that the proper plan was for the legislation to be completed on the advice of the Ministry of Canada, and then the power to disallow adopted where thought essential, without fettering the discretion of the Governor-General to assent to Bills, and so he asked very earnestly for the deletion from the royal instructions of the clauses relating to reservation which had hitherto been inserted in the royal instructions to Canada, and which required the reservation of Bills dealing with divorce, the grant of land or money to the Governor-General, paper or other non-sterling currency, differential duties, or imposing provisions inconsistent with treaties, or interfering with the discipline of the Imperial naval and military forces, or of an extraordinary nature and importance whereby the prerogative or the rights of persons not residing in the Dominion, or the trade and shipping of the United Kingdom and its dependencies, might be prejudiced, and any Bill previously disallowed or reserved and not assented to, unless the Bill were urgent, when it could be assented to if not repugnant to the law of England and not contrary to treaty, or unless it contained a suspending clause. In deference to the wishes and arguments of Mr. Blake, the instructions were remodelled to omit any mention of the reservation of classes of Bills, but it was clearly intimated that reservation was not being given up but merely that reservation as a fixed rule was abandoned, and a case of its use occurred in 1886. Since that date various Canadian laws have failed to pass into effect for various causes, but the form is usually that the law is not to come into effect until the Governor-General issues a proclamation, and no proclamation is permitted to be issued, as for instance is the case with the *Copyright Act* passed in 1889, and the fifteenth part of the *Merchant Shipping Act* (*Rev. Stat.*, 1906, c. 113) of Canada relating to load-lines ; or as in 1910, an Act (c. 57)

[1] Canada *Sess. Pap.*, 1877, No. 13.

establishing a control over rates for cable transit was conditional on the passing of legislation by the Imperial Parliament to a similar effect. All these Acts, if not passed *sub modo*, would no doubt have required for practical considerations to be reserved.

The absence of special instructions from the royal instructions was followed in the case of the Commonwealth in 1900[1], but not in the case of the Union of South Africa, where the subject of reservation is mentioned, and the Governor-General is forbidden to assent to any Bill which he has been specially instructed by the Secretary of State to reserve, and is told to take special care not to assent to any Act the reservation of which is required by the Constitution, and in particular he is directed to reserve any Bill which disqualifies any person who is or may become under the laws existing in the Cape Province at the time of union capable of being registered as a voter from being registered in the Union on grounds of colour or race only. This last sentence carries out a pledge given in Parliament during the discussion of the *South Africa Act*.[2]

In the case of New Zealand the instructions relative to the reservation of Bills were altered in 1907 to meet the change of status caused by the elevation of the Colony to the rank of a Dominion. In the six states and in Newfoundland there are still instructions, and there were instructions in the South African Colonies until the Union. Those of the Cape were on the same model as those of Natal, but excluded any reference to the reservation of proposed Acts on the ground that they affected differentially non-European persons,

[1] The form is as follows: 'VII. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Commonwealth, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.'

[2] See p. 963, n. 1.

because in the Cape the existence of the suffrage for natives rendered such a clause needless, while in the Transvaal and the Orange River Colony the provision for the reservation of such Bills was put in the letters patent, and there was also a clause in that instrument requiring the reservation of any Bill for the importation of indentured labour, and for the reservation of all Bills affecting the provisions of the letters patent,[1] a restriction which was not found necessary in the Cape or Natal. The insertion of the provisions in the letters patent of course made an essential difference in the result of an inadvertent assent: under the *Colonial Laws Validity Act* the assent, if the instructions are the only instrument concerned, is valid, but if the instruction to reserve is embodied in the instrument of government an assent is a mere nullity.

The terms of the instructions in the case of Newfoundland and of New South Wales, with which the rules in the case of the other states are identical, are as follows, those for Newfoundland dating from 1876,[2] and being in the antique style, while the omissions of military and naval matters and duties from the state form is because these are matters for Commonwealth legislation, and are not needed especially in a state instrument. With these the Natal instructions of 1893 may be compared:—

Newfoundland

XVII. Our said Governor is not to assent in Our name to any Bill of any of the classes hereinafter specified, that is to say:—

1. Any Bill for the divorce of persons joined together in Holy Matrimony.

2. Any Bill whereby any grant of land or money or other donation or gratuity may be made to himself.

3. Any Bill whereby any paper or other currency may be made a legal tender, except the coin of the realm or other gold or silver coin.

[1] Transvaal Letters Patent, December 6, 1906, s. 49; Orange River Colony Letters Patent, June 5, 1907, s. 51.

[2] The older type, those of May 4, 1855, contain very many more restrictions, and so in the older Canadian instructions printed in Canada *Sess. Pap.*, 1906, No. 18.

4. Any Bill imposing differential duties.

5. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

6. Any Bill interfering with the discipline or control of Our forces in Our said Colony by land and sea.

7. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of our subjects not residing in Our said Colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced.

8. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us :—

Unless such Bill shall contain a clause suspending the operation of such Bill until the signification in Our said Colony of Our pleasure thereupon, or unless Our said Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us, by the earliest opportunity, the Bill so assented to with his reasons for assenting thereto.

New South Wales

VII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes ;—

1. Any Bill for the divorce of persons joined together in Holy Matrimony.

2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.

3. Any Bill affecting the currency of the State.

4. Any Bill, the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

5. Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.

6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us :—

Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending

the operation of such Bill until the signification in the State of Our pleasure thereupon or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

Natal

VIII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes :—

1. Any Bill for the divorce of persons joined together in Holy Matrimony.
2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.
3. Any Bill affecting the currency of the Colony.
4. Any Bill imposing differential duties.
5. Any Bill, the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
6. Any Bill interfering with the discipline or control of Our forces in the Colony by land or sea.
7. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.
8. Any Bill whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable.
9. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us :—

Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the Colony of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty.

But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

The right of the Crown to give such instructions is expressly recognized in the *British North America Act*, s. 55, in the New Zealand *Constitution Act*, 1852, and in the Act for the Union of South Africa, s. 64. In the case of the six states the right, besides being recognized fully in the older Imperial Acts of 1842, 1850, and 1855, is expressly alluded to as existing in the Act of 1907, which simplifies greatly the question of the reservation of Australian State Constitution Bills. It was expressly recognized in the Cape *Constitution Ordinance* of 1852, in the Natal *Constitution Act*, No. 14, of 1893, and in the Transvaal and Orange River Colony letters patent of December 6, 1906, and June 5, 1907, respectively. The exception to these is in the case of the Commonwealth, where the provision merely runs:—58. 'When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.' Hence it has been argued that the Governor-General is intended to assent according to ministerial advice, for it gives him discretion subject to the Constitution, and the Constitution contemplates the principle of responsible government. This is of course unacceptable; the reference is clearly to the fact that he is required by law to reserve any law which would abridge the subjects in respect to which the Crown may be asked to grant special leave to appeal from a decision of the High Court. His discretion, again, is not a vague personal thing;[1] it is his discretion as an Imperial officer, and a Governor-General whose discretion did not coincide

[1] It would clearly be absurd to allow a Governor to act on a mere personal discretion against the views of a responsible government. Todd, *Parliamentary Government in the Colonies*,[2] p. 169, is certainly wrong in suggesting that the Governor should use his discretion as an Imperial officer; he should ask the Secretary of State for instructions, and does so. Cf. Harrison Moore, *Commonwealth of Australia*,[2] p. 111, and see below, pp. 1045, 1046.

with the views of the Secretary of State would soon find that he had not any longer any useful function to play as Governor-General.

In all cases in which a Bill is reserved in Canada, New Zealand, the Commonwealth, and the Union of South Africa, the time allowed for the assent being given, by Order in Council, is two years (one year in the case of the Union) from the date on which it was presented for the royal assent to the Governor. This was also the case in the Cape and in the Transvaal and the Orange River Colony Constitutions, but in Natal the time was left undefined. In the case of the six Australian states the provisions of the Act of 1842, revived by the Act of 1907, provide for two years in the case of Bills reserved under the provisions contained in the Act of 1907, but it is doubtful whether these provisions apply to Bills reserved under the instructions merely ; in my opinion they do not, and if that is so the Bills so reserved can be assented to at any time, unless it is held that the old Act still applies to such cases, which is difficult and doubtful. It may be added that it is difficult to say if any Bill is reserved under that Act or under the general instructions unless it is clearly stated by the Governor when he reserves, as was done by the Governor in reserving the Queensland Bill of 1908 for settling the deadlocks between the Houses of Parliament. Even if wrongly declared so to be reserved, the Bill will require to be assented to in two years in such cases. On several occasions instructions to assent have already been applied for and given, as, for example, in the case of the South Australian Constitution Act of 1910, and the Western Australia *Electoral Act* of the year 1911.

In Newfoundland there is no express provision for reservation, though the Governor is forbidden to assent to certain classes of Bills, and therefore it may be doubted whether any right of reservation, which is a very curious power, exists. Very possibly the power does not,[1] and in fact the mode of

[1] A Governor can of course delay assent for a reference (frequently telegraphic) home. But that is a different thing from abnegating the right to assent and reserving the matter for the royal assent. But if he did

procedure is for the Governor to see that a suspending clause is inserted. Thus, for example, there were suspending clauses both in the Act (c. 4) of 1905 and that (c. 1) of 1906 regarding foreign fishing-vessels, and the former was assented to but the latter was not; it should be noted that the wording of the latter Act is extraordinary, as it contemplates the Act being ratified by the King in Council, a possible reference to the powers of the Crown to adopt a Colonial Act as Imperial legislation under the Act of 1819 for the regulation of the fishery on the Newfoundland coasts. In any case, if reservation is possible, the position is just as it used to be in the Maritime Provinces of Canada before federation—there is no time-limit for the assent to be given. In the case of the Canadian Provinces the right of disallowance is vested in the Governor-General, who must act in Council, and the power must be exercised within a year. In one case, that of the Prince Edward Island Act abolishing the established liturgy of the English Church, assent was erroneously given too late, but the Act was re-enacted in due form in 1879.

Besides the reservation under royal instructions, there is of course reservation under the various Imperial Acts—or what is equivalent to reservation, the insertion of a suspending clause. Thus under ss. 735 and 736 of the *Merchant Shipping Act*, 1894, Acts passed by the Colonial Legislatures regarding the coasting trade and registered vessels require respectively to be confirmed by Order in Council and to contain a suspending clause, and to contain a suspending clause merely. Acts relating to admiralty procedure require, under the *Colonial Courts of Admiralty Act*, 1890, the previous sanction of the Admiralty, or must have a suspending clause, or be reserved. Moreover, in many cases the Constitution Acts, as has been seen already, require the reservation of Bills.

The advantages, as a matter of practical convenience, of reservation over disallowance are obvious. In the latter case an Act comes into force; it is acted upon for some

so in Newfoundland the royal assent would presumably render the Bill a good Act. For confirmation clauses, see 6 Edw. VII. cc. 2, 3; 7 Edw. VII. c. 14.

months ; arrangements are or may be made in contemplation of it, and then, after people have become used to it, the Imperial Government disallows. So obviously inconvenient is the procedure that it may fairly be asked whether the real desire of those who press for the adoption of disallowance is not to secure that the power shall never be used at all rather than incur the intolerable burden of disallowance. On the other hand, the reservation of a Bill allows of a quiet consideration of its terms and of negotiations for amendment and so on, and the Bill, if assented to, becomes absolutely valid without the possibility of disallowance. If the Bill was objectionable, at any rate there has been time for fuller consideration, and if drastic there has been time for preparations to meet it ; thus the New Zealand Navigation Bill of 1903 was only assented to in 1905 on an undertaking that a conference on merchant shipping would be held at which the whole subject would be discussed at length, and this was done in 1907, with the result that the Government of New Zealand was induced to undertake to amend, and did so very satisfactorily in Act No. 36 of 1909, which, like its predecessor, was reserved until 1911 pending discussion of certain of its sections. It is, in fact, clear, that in cases of serious doubt as to the Imperial action the advantages of reservation outweigh the theoretic preference for the disallowance of legislation on the Imperial authority. Nor could reservation properly be deemed to be a case in which ministers would be entitled to resign ; the power is a legal one vested in the Governor by law, and he cannot legally disregard his instructions. At the same time, it is clear that the practice of requiring whole clauses of Bills to be reserved is not now needed, and that individual instructions such as are specified in the royal instructions to the Governor-General in South Africa are now in point. As a matter of fact, free use is now made of the plan of asking for telegraphic instructions, and that has worked better than any formal reservation of Bills. It secures that the royal assent will not needlessly be delayed with regard to minor Bills.

The power of disallowance is conferred by express words

in the *British North America Act*,[1] the *Commonwealth of Australia Constitution Act*,[2] the State Constitutions,[3] the Constitution of New Zealand,[4] and that of the Union of South Africa.[5] It was also given in the Constitutions of the Cape, Natal, the Transvaal, and the Orange River Colony. The time allowed in the case of Canada, the Australian States, and New Zealand, and also formerly in the Cape and Natal, was two years from the date of receipt of the Bill by the Secretary of State, a necessary provision in the days when communications were so slow. In the case of the Commonwealth and the Union of South Africa, following the model of the Transvaal and the Orange River Colony, the period is dated from the time of assent, and in the Commonwealth and the Union of South Africa the period allowed is one year only, this being the same period as that allowed in the case of the Provinces of Canada, except that the time runs from the receipt of the Bill by the Governor-General in the latter case. In the case of Newfoundland the period is nowhere defined and is indefinite; it was, however, in the case of that Colony as well as formerly in the case of the Maritime Provinces of Canada, the rule to disallow within two years if at all, not as a matter of law, but on the analogy of the Constitutions where the limit was imposed by law. The power to disallow at any time is one which the Crown still possesses in the case of all the Crown Colonies except a very few.[6] A disallowance must be made by Order in Council in the case of responsible-government Colonies under the Constitutions, and in the case of Newfoundland under the letters patent, and it must be a disallowance *in toto*; partial disallowances, though not unknown in Crown Colony Constitutions, are not, it is clear, possible with a responsible-government Colony, and indeed they are open to so many

[1] 30 Vict. c. 3, s. 56. [2] 63 & 64 Vict. c. 12, Const. s. 59.

[3] See 5 & 6 Vict. c. 76, the provisions of which apply to all the states.

[4] 15 & 16 Vict. c. 72, s. 58. [5] 9 Edw. VII, c. 9, s. 65.

[6] It is limited in the case of the Leewards Federation by 34 & 35 Vict. c. 107; in the case of Jamaica by the Order in Council under 29 & 30 Vict. c. 12, &c.

objections even in Crown Colonies that they are hardly now in use. It is simpler to disallow and re-enact with changes.

When Acts are not disallowed it used to be the practice of the Crown to issue an Order in Council in the case of the responsible-government Colonies leaving the Acts to their operation; this is no longer done, all that is done being to intimate by dispatch that the King will not be advised to exercise his power of disallowance with respect to a measure. It is a moot point whether this is sufficient to debar His Majesty from exercising the power, should he later on desire to do so. At any rate, the question can hardly arise, as the Crown would scarcely propose nowadays to act in this manner. But of course the form is needless, and the course may be adopted of leaving Acts alone, this in some cases indicating that the Crown does not wish to express even formal approval of the Act in question.[1]

§ 3. The Subjects of Control

It is possible from the list of subjects for reservation, and from the returns which have been made to Parliament of Bills which have for one reason or another failed to receive the royal assent, to make out a fairly complete list of subjects in which the Imperial control has been exercised even in recent years. It is hardly possible to classify them in any very scientific manner; they may perhaps for our purposes be classified into (1) matters affecting the internal affairs of the Dominion; (2) native affairs; (3) the immigration of coloured races; (4) treaty relations and foreign affairs; (5) trade and currency; (6) merchant shipping; (7) copyright; (8) divorce and status: (9) military and naval defence. To these the letters patent and instructions add the grant of land or moneys to the Governor, matters affecting the prerogative, and questions affecting the interests of British subjects not resident in the Dominions, as to which a few words will be sufficient. The subject of honours, though

[1] Thus the Newfoundland Acts of 1895, cc. 7, 11, and 12; Natal Act No. 27 of 1895; and Western Australia, No. 54 of 1899, were so treated: *Parl. Pap.*, H. C. 184, 1906, p. 4.

included in matters affecting the prerogative, will deserve separate treatment, and the question of pardon will be treated of later on.

The rules forbidding a Governor to allow himself to receive grants of land or money are a relic from Crown Colony days, when such grants were at the disposal of a Governor, and when he could make himself a legal title by assenting to an Act which he secured the passing of, and then sell the lands, giving a good title to others, so that the mere disallowance was unavailing to prevent him profiting very substantially by his disobedience to orders. But in the self-governing Colonies the matter is also not without importance, for obviously if the Governor could receive gratuities from the Colonial Legislature he might be induced to be faithless to his trust. At any rate, in 1866–8, as has been seen above, the question of the grant of £20,000 to Lady Darling, the wife of Sir Charles Darling, was a clear example of an attempt to reward a Governor for past political services to the Lower House of Victoria, which he had supported against the Upper House. In that case the Governor had retired, and there was no question of his receiving the sum through an Act assented to by himself, but the Secretary of State decided that the principle of the independence of Governors must be vindicated at all costs, and the Upper House on its part determined that they would do nothing for a Governor who had thwarted them as far as he could.[1] Eventually the Secretary of State actually took the serious step of declining, in a dispatch of January 1, 1868, to permit the new Governor to take the formal step of asking the Parliament to vote the amount, all money votes requiring the assent of the Governor to their introduction, though he recalled the instruction a month later. There has been no serious case in a self-governing colony of such action since.

[1] Morris, *Memoir of George Higinbotham*, p. 138; above, Part III, chap. viii.

§ 4. Bills affecting the Prerogative

Bills affecting the prerogative include, of course, all Bills which in any way touch upon the executive power of the Crown exercised by the Crown otherwise than under statute. It would be absurd to expect that every Bill of this sort should be reserved, and the instructions contemplate merely the reservation of Bills of an extraordinary nature and importance. Thus any Bill which purported to allow of the appointment of a Colonial peerage, baronetage, or knighthood, would certainly require to be reserved; or a Bill conferring precedence, unless that precedence had already been agreed to by the Crown. Bills affecting the prerogative of mercy would require reservation; the latest case is the reservation by the Governor of Tasmania of a Bill of this sort, passed in 1907 (No. 17) by the Parliament, because it gave certain powers to the Governor. It did not take away the prerogative at all, but it conferred upon him the authority to act on a definite scheme of pardon with respect to offenders to whom the principle of indeterminate sentences had been applied. A corresponding Act of Victoria (No. 2106)[1] also dealt with this matter, but it was not reserved because it contained an express saving of the prerogative of the Crown; this was unnecessary, for it is a fixed rule of construction that the royal prerogative is not affected by anything short of express words or necessary intendment. In the case of Canada, in 1875 a proposal was made to make the Court set up in the place of the Privy Council as a final Court of Appeal the Supreme Court of Canada; but it was clearly intimated to the Dominion that any such action would be sure to result in the reservation of the Bill, and in its probably failing to become law, and therefore the Act reserved the right of the Crown to grant special leave to appeal;[2] it may

[1] Acts of New Zealand (No. 8 of 1906) and New South Wales (No. 15 of 1905) were not reserved, and contained no saving of the prerogative. The New Zealand Act No. 15 of 1910 regarding indeterminate sentences expressly saves the royal prerogative.

[2] Lord Norton, *Nineteenth Century*, July 1879, p. 173. Canada Act 38 Vict. c. 11, s. 47; *Rev. Stat.*, 1906, c. 139, s. 59.

be added that the statute of 1844[1] gives to the Crown a paramount right to allow any appeal whatever from the Supreme Court of Canada, though for some unknown reason the right has not been asserted in recent discussions. A Canadian Act of 1889 bars the appeal entirely in criminal cases; this was passed with the consent of the Crown, as in such cases the Judicial Committee have no desire to interfere with the decisions of the Supreme Court of a Dominion, though the Act is really *ultra vires* as repugnant to the Imperial Act 7 & 8 Vict. c. 69. There is, it may be added, a general disinclination to legislate on such topics, and the Imperial Government also does not desire such legislation; in the case of the Constitution of Natal, when the matter was being discussed, the Committee of the Legislative Council which had the Bill in hand proposed to give the Crown the right of appointing a Governor instead of leaving it to the prerogative, and the Imperial Government asked that this should not be done, as the matter was more conveniently dealt with by the exercise of the prerogative unhampered by statutory enactments. So in South Australia in 1906,[2] when it was proposed, at the instance of the Chief Justice, by the Government to pass a Bill dealing with the powers of the Lieutenant-Governor or Administrator, the Legislative Council was unfavourable to the scheme on the ground that it was a matter of the prerogative, in which it did not desire to fetter the Crown. It is true that in that case the Bill was very harmless, as it merely made it clear that there were certain powers which a deputy Governor could exercise, and which were considered of doubtful validity by the Chief

[1] 7 & 8 Vict. c. 69. So the Victoria *Supreme Court Act*, 1890, attempts vainly to increase the appealable limit to £1,000 as against £500 in the Order in Council of 1860, but the Court disregards the Act.

[2] South Australia *Legislative Council*, 1906, Sess. 2, p. 141; *House of Assembly Debates*, 1906, Sess. 1, pp. 191 seq. A Governor cannot appoint a deputy without express authority; see Forsyth, *Cases and Opinions on Constitutional Law*, pp. 79, 80. In Canada the Governor-General has statutory authority to appoint Administrators *vice* the Lieutenant-Governors, and in some provinces the latter have by Provincial Acts power to appoint deputies for definite ends.

Justice when exercised only in virtue of a deputation given by the Governor under the letters patent, but it hampered somewhat the freedom of the Crown to appoint a deputy. An amended Bill was reserved in 1910 and assented to.

Acts suitable for reservation are those which purport to confer upon public bodies in the Colonies the title 'Chartered'. This is a privilege of the Crown, and should not be conferred by a Colonial Legislature unless it is desired deliberately to render nugatory the royal prerogative. Thus, an Ontario Act (c. 42) of 1908 was ultimately disallowed by the Dominion Government, because not only did it create a chartered society of accountants, but forbade the use by persons not members of it in the provinces of the name 'Chartered Accountant'. The Act was re-enacted in 1910 (c. 79), disallowed, and re-enacted in 1911 (c. 48) by the Provincial Legislature. In Newfoundland a similar Act was amended at the request of the Imperial Government.[1] There is, of course, no great principle at stake in such cases; it is merely a matter of good feeling and courtesy not to legislate so as to usurp a prerogative of the Crown; there is no objection to the Legislature doing what it likes in substance, but the same motive which induces the Imperial Parliament not to confer by Imperial legislation the title 'Chartered' would seem to operate. Or again the title 'Royal' should only be conferred by consent of the Crown in any case where the term could seem to indicate royal patronage and support, though the rule has often been, unintentionally no doubt, violated. Of recent years, however, the Canadian Government have strictly refused to consent to pass Acts incorporating companies and other bodies under such a title unless the royal permission has first been obtained; this was done in 1910 in the case of the incorporation of the Royal Guardians of Canada, and this is clearly the only correct principle.[2] Similarly, no institution in the Colonies should call itself 'Royal' without express permission from the Crown, and this permission given by one sovereign

[1] 6 Edw. VII. c. 29. See also *Provincial Legislation*, 1904–6, p. 159.

[2] See 9 & 10 Edw. VII. c. 158; *Canadian Annual Review*, 1910, pp. 118, 119.

is valid throughout, not being affected by the demise of the Crown. The rule is, of course, rigidly adhered to in the case of military corps in the Dominions; for them to adopt the title 'Royal' without consent would be most improper—that it would be legal under an Act is of course obvious, and even if made by executive action it cannot be said that there is any means of preventing it in law—and in addition the title would lose all its value as a mark of distinction unless it were derived from the throne and through the personal approval of the Crown. So, too, no institution should, without the royal sanction, assume any name signifying the connexion with the reigning monarch, such as King George Hospital.

There also may be mentioned the case of reduction of the salary of the Governor; in the Australian States all such Acts still require reservation under the Act of 1907 [1] as under the Act of 1842,[2] but this is not normally the case in law. The Canadian Parliament in 1868,[3] in a fit of economy, reduced the salary of the Governor-General, which was fixed at £10,000, with power to the Parliament to alter, to £6,500 a year, a remarkable figure at that time, when the great Australian colonies gave salaries of £10,000 a year. But the Act was reserved and never assented to, the Secretary of State pointing out that the reduction would reduce the position of the Governor-General to that of a third-class governorship. The various Acts which since federation have been passed to reduce the salaries of the Governors of the states have been reserved and assented to in due course, for the Imperial Government will not refuse to accept a decision to reduce the salary if it is deliberately desired by a Dominion or state. The result of a diminished salary is diminished entertaining on the one hand, and a diminished status of the

[1] 7 Edw. VII. c. 7.

[2] 5 & 6 Vict. c. 76, s. 31; 13 & 14 Vict. c. 59, s. 18.

[3] Canada *Sess. Pap.*, 1869, No. 73. The Canadian Parliament in 1869 fixed the salary at £10,000 of its own authority, and the Act (32 & 33 Vict. c. 74) was assented to after reservation on August 7, 1869. See *Rev. Stat.*, 1906, c. 3, s. 4.

Governor on the other, and if a state or Dominion desires these results—which need not really affect efficiency of gubernatorial control, for a young man may take the office as a stepping-stone to greater things—there can be no real ground of objection. In the case of the Australian states it has been thought from time to time in the state that a reduction of salary will result in the Imperial Government assenting to the desire to see local men appointed to the posts, but that is another matter, and, as pointed out by Lord Crewe to the Premier of South Australia, it could only be adopted as part of a deliberate policy, which, as the Secretary of State clearly indicated, would mean the reduction of the states to the position of the Canadian Provinces, which in theory is that of subjection to the central Government. In the case of Natal, the Imperial Government insisted in 1892 on the salary for the first Governor under responsible government being fixed at £4,000 to begin with instead of the £3,000 proposed by the Committee of the Legislative Council which drafted the Act for responsible government.

§ 5. Bills affecting Absentees

The intervention of the Imperial Government in cases affecting the rights of persons not resident in the Dominion in which legislation is passed is reduced to the narrowest limits, and only Bills of a very extraordinary character could possibly be dealt with on this ground ; it is, of course, open to the Imperial Government to press for fair treatment of such persons, and it has done so whenever the case seemed to require it, but the right of representation in such cases is not more than could be used to a friendly foreign power, as it is not contemplated to enforce the power of disallowance. A good example of the principles which have animated the Imperial Government in this regard, and of its freedom from the desire usually imputed to it to interfere in the affairs of the Dominions, is seen in its action with regard to the Act passed by Canada in 1874 to regulate the construction and maintenance of marine electric cables. This Act was reserved by the Governor-General for the signification of

the royal pleasure. The Anglo-American Company had opposed its passing in the Senate; their objections had been overruled, but the Act was reserved because the Privy Council of the Dominion thought that it might be held to fall under the charge of prejudicing the rights of Her Majesty's subjects not resident in the Dominion. The Canadian Government, however, asked that the royal sanction might be given at an early date, the company on its part petitioned the Imperial Government for its being refused the royal assent, and on October 29, 1874, the Secretary of State intimated that he had not felt entitled to take the responsibility of deciding what steps should be taken with regard to the measure; then he continued: 'it seems to me to be clearly within the competency of the Dominion Government and Parliament to legislate' on the matter in question, as it was one 'involving no points in respect of which it would appear necessary that Imperial interests should be guarded, or the relations of the Dominion with other colonial or foreign governments controlled'. 'It is obvious,' he added, 'that if the intervention of Her Majesty's Government were liable to be invoked whenever Canadian legislation on local questions affects or is alleged to affect the property of absent persons, the measure of self-government conceded to the Dominion might be reduced within very narrow limits. It is to the Dominion Government and Legislature that persons concerned in the legislation of Canada on domestic subjects and its results must have recourse, and this Government cannot attempt to decide upon the details of such legislation without incurring those complications which are consequent upon a confusion of authority.' No action was taken on the Bill, and in the next session a new Bill was brought in in which the rights of the parties interested were more carefully adjusted than in the previous Act, and this Act, after modification in both Houses, was passed into law and received the royal assent from the Governor-General.[1] The

[1] Canada *Sess. Pap.*, 1875, No. 20. This correspondence and all other relating to disallowance or reservation of Dominion Acts is reprinted in *Provincial Legislation*, 1867–95. See also below, p. 1044.

same principle is illustrated very neatly by a very recent case. In 1908 [1] the Parliament of New South Wales passed an Act, which was intended to confirm a previous Act by which it had been intended to lay down certain steps to dispose finally of the question of various land licences granted by the Minister of Lands, who had been found to have been guilty of serious misbehaviour in regard to this question. It was provided in the original measure that the various cases of grants made by him should be carefully considered and disposed of by a committee appointed for that purpose. This was done, but the parties who had acquired land from the Minister, either directly or indirectly, were in some cases aggrieved by the decisions, and took advantage of a flaw in the Act of bringing the matter into the Courts; the Government then introduced a Bill to confirm the decisions arrived at under the previous Act, and this Bill was assented to by the Governor, though there were addressed to him and the Imperial Government, various petitions alleging that the decision was unfair, and that it affected injuriously holders of land who lived in the United Kingdom. But the petitioners were not granted the relief they craved, and indeed it would be impossible to assent to the doctrine that an Act should properly be interfered with by the Imperial Government because it affected absentees. Thus the Land Tax Acts of the Commonwealth Nos. 21 and 22 of 1910 [2] are deliberately intended to affect such absentee owners, on the very ground which has been adopted in New Zealand as a fixed principle that owners of land in the Dominion who are not resident there, and do not allow the country to benefit by the expenditure there of the revenues it produces, should pay an extra contribution to the state revenues.

Of course there are exceptions to the rule; for example,

[1] See *Times*, June 27 and July 3, 1908, for an attack on the Colonial Act and for the reply of the Agent-General; Acts No. 42 of 1906; 4 of 1908.

[2] A request that the Governor-General be instructed to reserve was declined, and petitions for disallowance rejected. Its validity has been upheld by the High Court in *Osborne* v. *The Commonwealth*.

a Tasmanian Act of 1908 was reserved and has not been assented to, which contained certain provisions as to foreign companies (any company not incorporated in the island itself is technically in Company Acts a foreign company) which seemed to render there being danger of unfavourable treatment of such companies. The measure was introduced by a private member, and the Government acquiesced in the failure of the Bill to receive the royal assent. On the other hand, in 1896, after a correspondence with the Tasmanian Government, an Act affecting such companies and allowing special privileges in certain cases to local creditors was allowed to take effect.[1]

In another set of cases the Imperial control has not been exercised, but an arrangement has been suggested for minimizing hardship. Thus, for example, the Finance Act of 1894 provides for a reduction of duty in the case of assets situated in a Colony if duty has been paid there on death, provided that the Colony adopts the same rule with regard to the United Kingdom, or it does not charge any duty upon assets there at all. This arrangement is applied by Order in Council whenever a Colony decides to make an arrangement, and has been so applied to the Australian States except Queensland, the Canadian Provinces, and New Zealand. But of late the arrangement by which the Orders in Council have been made have been neglected by several Colonies, including New Zealand and Quebec, and the Imperial Government will have either to modify the position by revoking the Orders in Council or to abandon any attempt at enforcing the provisions for reciprocity.[2] Already an order issued in respect of the Cape has had to be rescinded. But even in these cases there has been no question of disallowance, nor in the case of the Transvaal death duties under the Act No. 28 of

[1] See Clark, *Australian Constitutional Law*, pp. 321 seq.; 59 Vict. No. 17.

[2] Tasmania in 1909 (No. 8) amended its legislation to accord with the Imperial conditions, Ontario in 1910 (c. 6), and Manitoba in 1911 (c. 60). In the provinces of Canada no Act can legally affect property outside the province, even if the owner is domiciled inside; see *Woodruff* v. *Attorney-General for Ontario* [1908] A. C. 508, and cf. *Lovitt* v. *Rex*, 43 S. C. R. 106.

1909, though these death duties evade *in toto* the provisions of private international law by requiring a duty to be paid in respect of shares of companies whose head-quarters and registration are in England, if they are companies dealing with mines in the Transvaal, by assimilating such shares to the land of the Transvaal.[1] Thus on a death in England of an owner of such shares the Transvaal Government insists on payment of a death duty, an extraordinary provision, and one which it would be difficult to enforce in England but for the fact that it can be made binding in effect on the companies by requiring them to pay it if the owner's representatives do not, so that the companies will not register a transfer without payment being made, and the cost of completing such a transfer, if indeed possible—for the law can require all transfers to be made locally—would be prohibitive. That such a law should be allowed to stand is a good example of the manner in which difficulties arising from the exercise of very strained powers by the Colonial Governments are avoided by the Imperial Government deciding to allow the legislation to stand subject to the possibility of the success of private representations having a good effect.

§ 6. Bills *ultra vires*

Allied to this topic is that of the interference with legislation obviously *ultra vires* such as is from time to time passed by the Dominion Governments. The rule in these cases seems clearly to be that a law which is *ultra vires* as a whole had better be disallowed, but not one which is only so in part. Thus in 1862, an Act of 1861 of the United Province of Canada was disallowed because it purported to empower magistrates to deal in Canada with offences committed in New Brunswick, for which purpose, in the opinion of the Imperial Government, Imperial legislation was required, or an arrangement in the nature of an extradition agreement between the two Colonies to be carried out by provincial legislation.[2] This latter course was adopted by the South

[1] See *Parl. Pap.*, Cd. 5135, pp. 105 seq.; 5746–1, pp. 267–9.

[2] Canada *Legislative Assembly Journals*, 1862, p. 101.

African Colonies in 1905. In 1869, on the other hand, the Imperial Government merely pointed out that certain sections of an Act contained a provision *ultra vires* as tending to affix a criminal character to acts done on the high seas,[1] and in the next year the Act was amended accordingly to obviate this error.[2] An Act of 1873 which purported to give power to the committees of the House of Commons and the Senate to examine in certain cases witnesses on oath was disallowed on the ground that it was repugnant to the provisions of the *British North America Act* regarding the privileges of the Parliament of Canada,[3] but an Imperial Act of 1875 (c. 38) secured the grant of further powers, and validated *ex post facto* an Act of 1868 (c. 24) which had been assented to, but was certainly invalid, as it gave the Senate the power of administering oaths to the witnesses at the bar, a power not enjoyed in 1867 by the House of Commons of the United Kingdom. The Oaths Act was accordingly re-enacted and assented to in 1876.[4] In 1872 a Canada Copyright Bill[5] was not allowed to take effect as it was *ultra vires* in view of Imperial legislation, and so the Act of 1889 (c. 29) never became effective.[6] On the other hand the Act of 1875 was validated by an Imperial Act.[7]

[1] Canada *Sess. Pap.*, 1870, No. 39.
[2] 33 Vict. c. 26.
[3] Canada *House of Commons Journals*, October 23, 1873; *Sess. Pap.*, 1876, No. 45; Imperial Act 38 & 39 Vict. c. 38; *Parl. Pap.*, C. 83.
[4] 39 Vict. c. 7.
[5] *Provincial Legislation*, 1867–95, pp. 11–3.
[6] Ibid., pp. 30 seq.
[7] See 38 Vict. c. 88 and 38 & 39 Vict. c. 53.

CHAPTER II

IMPERIAL CONTROL OVER THE INTERNAL AFFAIRS OF THE DOMINIONS

In matters really affecting only internal affairs there has been a complete change in system since the grant of responsible government. As a return presented to the House of Commons in 1864[1] shows, before the coming into effect of responsible government there were repeated cases of disallowance on such grounds as that the legislation suggested did not commend itself to the wisdom of the Imperial Government. Thus all efforts by Prince Edward Island to dispose of its land question were for years unavailing, and the matter only became arranged by a grant from the Dominion on federation. In the case of the United Province of Canada in 1843 the Governor reserved, despite the protest of ministers who resigned in consequence, a Secret Societies Bill, and in due course the Imperial Government intimated that it would not be allowed.[2] In 1846 the Imperial Government disallowed a Bill which allowed the attachment of an officer's salary on the ground that no such measure was in force in the United Kingdom and they did not approve the policy of it.[3] In 1849 an Act for the incorporation of the town of Bytown, passed in 1847, was disallowed, though another Act passed in 1849 was assented to.[4] In 1858 the Governor of New South Wales assented to a Bill to impose an assessment on runs and to increase the rent of leased lands, one of his law officers, the Solicitor-General, thinking that it was legal, while the other thought that it was not legal. The Secretary

[1] *Parl. Pap.*, H. C. 529, 1864.
[2] Ibid., p. 27.
[3] Canada *Legislative Assembly Journals*, 1846, p. 43.
[4] Ibid., 1850, p. 7.

of State approved his having assented, considering that the Act was of doubtful legality which could best be tested in the Courts ; if it was held to be illegal it would be disallowed if the period available had not by the time run out. In that case the ground of illegality was repugnance to previous Imperial Acts dealing with land legislation in the Australian Colonies.[1]

The case of Prince Edward Island is of some interest, for the questions there presented some analogies to those which have caused so much trouble in Ireland. The province was burdened by a race of absentee landlords, the tenants were unable to pay the rents, and the Colony was in a wretched condition of lack of progress and of all prospect of advancement. It passed, therefore, an Act (No. 814) in 1851 which was intended to fix in currency the payments for land which as fixed in sterling had become beyond the ability of the tenants to pay, but the Act was disallowed as an interference with property, though passed unanimously by the Legislature of the island in the Lower House.[2] Then in 1855 they passed two Acts (Nos. 913 and 915), one to impose a rate upon the proprietors for the purpose nominally of paying for the military protection of the island on the withdrawal of the forces, and another to secure compensation to tenants for improvements in the lands of the island. Both were refused the royal assent ; Sir George Grey wrote[3] : 'The Lieutenant-Governor and Legislature of Prince Edward Island must remember that, although responsible government has been established in that island, responsible government exists also in Great Britain ; and Her Majesty's Government cannot take upon themselves the responsibility of advising the Crown to give its assent to Colonial Acts which are at variance with the principles of justice and invade those rights of property which are the foundation of social organization ; and I have to observe that former Governments have on various occasions been obliged, with reference to Acts passed in Prince Edward Island, to uphold

[1] New South Wales *Legislative Assembly Votes*, 1859–60, iii. 911.

[2] *Parl. Pap.*, H. C. 529, 1864, p. 41.

[3] Ibid., p. 42.

those principles and to protect those rights by pursuing a course similar to that which Her Majesty's present advisers deem it their duty to pursue.' The former Act was condemned as being an Act passed by a majority to throw the burden of taxation on an unrepresented minority, while the latter Act gave the proprietors the option of making over to the tenant the land itself or of making over a sum which would go beyond the value of the land. In 1858 another Act (No. 997) was refused sanction, viz. one to resume the fishery reserves, certain land along the shore, to the Crown, although they had for years been treated as private property, and to transfer them in fact to the tenants. Sir Edward Lytton urged the Legislature to abandon these attempts to settle the question, and to put forward a practicable scheme.[1] But although a commission was appointed to consider the question, and two Bills (Nos. 1105 and 1106) were passed in 1862 to give effect to their recommendations, the two Bills failed to become law, as the Imperial Government regarded them as merely new efforts to deprive the owners, without adequate compensation, of their holdings of land. The provisions of the Tenants Compensation Bill were re-enacted in 1871 [2] and again disallowed, but in 1872 [3] it was re-enacted and then returned for consideration with certain suggested amendments; these amendments were accepted, and then the Act was permitted to come into operation.[4] In 1863 an Act (No. 1136) of the province to incorporate the Grand Orange Lodge of the island was disallowed, the Secretary of State writing :— [5]

I deeply regret that the Legislature of Prince Edward Island should have given its sanction to a class of institutions which all experience has shown to be calculated, if not actually intended, to embitter religious and political differences, and which thus must be detrimental to the best interest of any

[1] *Parl. Pap.*, H.C. 529, 1864, p. 43.

[2] 34 Vict. c. 9; see *Parl. Pap.*, C. 1351, pp. 1–11.

[3] 35 & 36 Vict. c. 10; *Parl. Pap.*, C. 1351, pp. 11–38.

[4] 36 Vict. c. 24. For subsequent legislation see *Parl. Pap.*, C. 1351, 1487, 2795; *Provincial Legislation*, 1867–95, pp. 1151, 1164.

[5] *Parl. Pap.*, H. C. 529, 1864, p. 46.

Colony in which they exist. Holding these views regarding the measure, I have felt it impossible to advise Her Majesty the Queen to signify her royal approbation of it, without which I am glad to observe that it will not take effect.

In 1861 an Act to incorporate the Roman Catholic Bishop of Charlottetown was refused assent, but it was allowed in the following year (25 Vict. c. 16).[1]

Newfoundland has not been very happy in her domestic legislation. In 1858[2] an Act to provide for the liquidation of the debt incurred in connexion with streets in St. John's was disallowed, and in 1859 an Act to provide for the payment of the owner's assessment, to be levied under the provisions of an Act to incorporate the General Water Company, was disallowed; in 1865 an Act to continue the power of banishment was disallowed, this being in contravention of the principle that criminals should not be turned loose on foreign communities, as asserted later in the case of the Australian bushranger Gardiner.[3] In 1890 an Act respecting the municipality of St. John's was disallowed, all these being cases of disallowance on grounds of the unsound policy of the proposals made by the Legislature. To three Acts of 1895, cc. 7, 11, and 12, dealing with loan transactions, warehouse receipts, and elections, the royal assent was not signified as a mark of disapproval of their provisions, but no disallowance took place. But in regard to an Act (c. 28) of 1897 which was reserved, the royal assent was withheld, as the Act was little more than a means of misusing the public finances in the interests of a political party.

In Victoria an Act of 1860 was reserved; it purported to abolish the pensions awarded to officers removed on political grounds, and for that reason the royal assent was withheld, but it was given to an amended measure passed in 1864.[4] In 1862 another reserved Bill to grant a preferential lien on growing crops without delivery was not assented to, as being too far advanced for the Imperial ideas at the time; it

[1] *Parl. Pap.*, H. C. 196, 1894, p. 7. [2] Ibid., p. 8.
[3] *Parl. Pap.*, C. 1202. [4] *Parl. Pap.*, H. C. 196, 1894, pp. 8 9

became law in 1876 in much the same form.[1] In Queensland an Act of 1860 regarding the Supreme Court was not assented to and never became law, and in 1881 a curious Bill against the introduction of foreign criminals which was reserved never received the royal assent. Another Bill in 1879 for the apprehension in Queensland of criminals which had come from other states was never assented to, but the principle was enforced by the passing of the Imperial *Fugitive Offenders Act*, 1881, part ii of which made provision for the case of contiguous colonies like those in Australia, and which was applied to Australia, rendering the passing of local Acts unnecessary.[2] In South Australia there was disallowed an Act of 1864 which was intended to make more stringent provisions against the introduction of convicted felons and other persons sentenced to transportation, a measure directed against any possible attempt of the Home Government to introduce such persons into the Colony, which was very proud of its free origin.[3] In Tasmania an Act to abolish the grant of state aid to religion was also refused assent in 1859, but a similar Act (No. 30) was passed in 1868 and assented to. A Bill of 1861 affecting the salary of the Governor then in office was not assented to, and an Act regarding prisoners was disallowed in 1863. In 1867 a Bill to reduce the salary of the next Governor of Tasmania failed to receive the royal assent, but in 1873 the Bill became law, and subsequent legislation was passed in 1883. The Bill of 1867 was re-enacted next year, only again to fail to receive the royal assent.[4] In Western Australia an Act (No. 39) regarding patents passed in 1900 was not assented to as the matter was becoming shortly one for the Federal Government to consider in its whole aspect.[5]

In New Zealand there was a refusal of assent to a Railway Bill in 1861, and in 1863 to a Bill to enable the Provincial Legislatures to acquire land compulsorily. Then there were not assented to a Bill of 1867 to reduce the salary of the

[1] *Parl. Pap.*, H.C. 196, 1894, pp. 8, 9.
[2] Ibid., p. 9.
[3] Ibid., pp. 9, 10.
[4] Ibid., p. 10.
[5] *Parl. Pap.*, H. C. 184, 1906, p. 5.

Governor, and in 1883 a Bill to allow of the federation with New Zealand of any island in the Pacific of which the constituted authority made proposals to that effect to the Government of New Zealand. The proposal was clearly far too ambitious a one, and in any case the matter was one to be dealt with by the Imperial Government and not by a local Act.[1] In 1900 the Bill (No. 73) to establish an ensign for New Zealand was reserved and not assented to, being replaced by a later Act. New Zealand is the only Dominion which has a distinctive flag for shore purposes as well as at sea, under the *Merchant Shipping Act*, 1894.[2]

The relations of the Imperial Government to the Dominions in money matters have several times been discussed. The view that in any sense the Imperial Government is responsible for the finances of a self-governing colony because the Governor assents to Acts and they are not disallowed by the Imperial Government[3] has been strenuously and correctly denied by the Secretary of State. The matter came to an issue in 1895, when the distress in Newfoundland in consequence of the failure of the Commercial Bank caused the Government, through their special commissioner, Sir F. Evans, to ask that the Imperial Government should guarantee the sum of £20,000 a year for twenty-five years as interest on bonds which they proposed to issue; the Imperial Government declined to do so, as it was a necessary consequence of the fact that Newfoundland had responsible government that it should not look for Imperial assistance in any financial matters: but they were ready, as the distress was so great, to send out a special commissioner who would inquire into matters and relieve actual cases of distress. The Colonial Government then asked that a loan might be made to enable the savings-bank, which was embarrassed by the failure of the banks, to meet the loans of depositors,

[1] *Parl. Pap.*, H. C. 196, 1894, p. 11.

[2] *Parl. Pap.*, H. C. 184, 1906, p. 4; *Canadian Annual Review*, 1910, pp. 261, 358; below, pp. 1314, 1315.

[3] New Zealand *Parl. Pap.*, 1873–4, A. 2, No. 25; cf. *Colonial Stock Act*, 1877.

but that also was refused on the same grounds as before. Then Sir H. Murray was sent out, and £5,000 was advanced to meet the immediate needs of the people, and later on £15,000 was placed at his disposal.[1]

Sir H. Murray was subsequently appointed Governor of the Colony, and on February 22, 1898, he telegraphed for instructions with regard to the sale of the Government railway in the Colony.[2] He was asked in reply for details, and on February 28 he sent the details by telegram, and a further message urging that the Secretary of State should give him instructions as to whether he should sign the proposed contract for the sale of the line or not. The Anglo-American Telegraph Company telegraphed on March 2 to the Secretary of State protesting against any contract which would interfere with their exclusive rights to build and work telegraph lines and land cables in the island. On the other hand, the Government urged that the contract would provide work for thousands of men urgently needing it, and afford a sum of money to pay off debenture bonds which was required at once. They argued that the assent to the contract should at once be given, allowing the matter of further consideration to proceed when the Act was sent home. Mr. Chamberlain replied on March 2[3] that the future of the Colony would be placed by the contract entirely in the hands of the contractor, that the essence of the transaction seemed to be the sale of a million and a quarter acres for a million dollars, and the additional annual charge of 170,000 dollars was a serious thing in conjunction with the deprivation of all its assets for a Colony so heavily burdened already. He added:—'You should point out those considerations to your ministers, but, as entire responsibility rests with them, you would not be constitutionally justified in refusing if they ask for your signature. In that case it will be necessary to reserve and safeguard specifically all rights of the Anglo-American Company under Act No. 2 of 1854.' The Governor was asked by the Company and by the Opposition to reserve

[1] *Parl. Pap.*, H. C. 104, 1895; C. 7686.

[2] *Parl. Pap.*, C. 8867, p. 1.

[3] Ibid., p. 3.

the Bill, as it affected the interests of persons not resident in the Colony. In replying to his request for instructions on March 7, the Secretary of State was not prepared to direct reservation, as the matter was one for which the Government of Newfoundland must be responsible. He desired, however, that the rights of the Company should be properly safeguarded; if this were not done, the Governor should not assent [1] until a second Bill had been passed. The Legislature at once passed a Bill to safeguard all the rights of the Company. In reply to his telegram announcing this the Governor was authorized to assent to the Bill, which he accordingly did. Mr. Chamberlain followed up this telegram with a dispatch of March 23, 1898, in which he wrote as follows :— [2]

In my telegram of the 2nd instant I informed you that if your Ministers, after fully considering the objections urged to the proposed contract with Mr. R. G. Reid for the sale and operation of the Government railways and other purposes, still pressed for your signature to that instrument, you would not be constitutionally justified in refusing to follow their advice, as the responsibility for the measure rested entirely with them.

2. Whatever views I may hold as to the propriety of the contract, it is essentially a question of local finance, and as Her Majesty's Government have no responsibility for the finances of self-governing colonies, it would be improper for them to interfere in such a case unless Imperial interests were directly involved.

On these constitutional grounds I was unable to advise you to withhold your assent to the Bill confirming the contract.

3. I have now received your dispatches as noted in the margin, giving full information as to the terms of the contract, and the grounds upon which your Government have supported it, as well as the reasons for which it was opposed by the Leader and some members of the Opposition.

4. I do not propose to enter upon a discussion of the details of the contract, or of the various arguments for and against it, but I cannot refrain from expressing my views as to the

[1] Not to reserve, which cannot probably be done in Newfoundland, but merely to delay assent, as a Governor can legally do. See p. 1016, n. 1.

[2] *Parl. Pap.*, C. 8867, p. 23.

serious consequences which may result from this extraordinary measure.

5. Under this contract and the earlier one of 1893 for the construction of the railway, practically all the Crown Lands of any value become, with full rights to all minerals, the freehold property of a single individual, the whole of the railways are transferred to him, the telegraphs, the postal service, and the local sea communications, as well as the property in the dock at St. John's. Such an abdication by a Government of some of its most important functions is without parallel.

6. The Colony is divested for ever of any control over or power of influencing its own development, and of any direct interest in or direct benefit from that development. It will not even have the guarantee for efficiency and improvement afforded by competition, which would tend to minimize the danger of leaving such services in the hands of private individuals.

7. Of the energy and capacity and character of Mr. Reid, in whose hands the future of the Colony is thus placed, both yourself and your predecessor have always spoken in the highest terms, and his interests in the Colony are already so enormous, that he has every motive to work for and to stimulate its development, but he is already, I believe, advanced in years, and though the contract requires that he shall not assign or sub-let it to any person or corporation without the consent of the Government, the risk of its passing into the hands of persons less capable and possessing less interest in the development of the Colony is by no means remote.

8. All this has been fully pointed out to your Ministers and the Legislature, and I can only conclude that they have satisfied themselves that the danger and evils resulting from the corruption which, according to the statement of the Receiver-General, has attended the administration of these services by the Government, are more serious than any evils that can result from those services being transferred unreservedly to the hands of a private individual or corporation; and that, in fact, they consider that it is beyond the means and capacity of the Colony to provide for the honest and efficient maintenance of these services, and that they must therefore be got rid of at whatever cost.

9. That they have acted thus in what they believe to be the best interests of the Colony I have no reason to doubt, but whether or not it is the case, as they allege, that the

intolerable burden of the public debt, and the position in which the Colony was left by the contract of 1893, rendered this sacrifice inevitable, the fact that the Colony, after more than forty years of self-government, should have to resort to such a step is greatly to be regretted.

10. I have to request that in communicating this dispatch to your Ministers you will inform them that it is my wish that it may be published in the *Gazette*.

Mr. Chamberlain also sent a dispatch to the Governor on March 30, as follows :—

I have the honour to acknowledge the receipt of your dispatch of March 6, forwarding a Memorial from the Newfoundland agents of the Anglo-American Telegraph Company protesting against the Railway Contract Act.

I shall be glad if you will inform the Memorialists that I have carefully considered their representations, but that I am unable to comply with their prayer, and that the rights of the Company appear to be sufficiently safeguarded by the Supplementary Act which has been passed.

The passing of this Act was followed by the suggestion by the Government that negotiations should be opened with the Imperial Government for a grant of a royal commission with the end of obtaining financial aid from that Government.[1] To this proposal the Imperial Government firmly demurred, pointing out that, since the idea of assistance had been mooted in 1890–1, circumstances had changed : the idea then was to provide means for the Government building a railway, now the railway had been built, and most of the assets of the Colony had been alienated without consulting the Imperial Government, which could not for a moment consider the grant of financial assistance to a self-governing colony, and would not therefore appoint a royal commission.[2]

The opponents of the contract were by no means content with the situation, and insisted on petitioning the Secretary of State for the disallowance of the measure, and asked that Sir H. Murray, who had resigned his office, should be requested to remain as Governor. They protested that the contract

[1] *Parl. Pap.*, C. 8867, p. 33.

[2] A commission was sent in 1899, but to report on the French rights, not as to financial aid.

had not been an issue at the election of 1897, and that as a matter of fact the contract and the Bill were rushed through the Houses of Parliament without full consideration and opportunity for protest. Moreover, a very discreditable fact shortly came to light: the Governor ascertained that the member of his Council who was most active in pushing the Bill through the Legislature was also the paid legal adviser of the contractor for the line, Mr. Reid. The Governor then called upon the minister to resign all his offices save that of Queen's Counsel, and the minister in question did so, as he did not wish to remain a member of the Executive Council if his presence there were distasteful to the Governor.[1]

To all these representations the Secretary of State replied declining to disallow the Act for reasons which are set out at length in the dispatch of December 5, 1898, which follows, and which it is desirable to give in full, for it epitomizes the precise duty of the Imperial Government in regard to Colonial legislation, and while it added theoretically no new principle to those by which Secretaries of State had long been guided, it applied an old principle in circumstances which formerly would probably have been deemed to exclude the ordinary rules because of the manifest gross impropriety of the Act in question. The dispatch runs: [2]—

I have the honour to acknowledge the receipt of your dispatch of October 6, forwarding copies of the resolutions passed at a public meeting of the inhabitants of St. John's on October 4, urging that Her Majesty should be advised, either to disallow the Act passed in the recent session of the Legislature of Newfoundland to give effect to the contract with Mr. Reid, or that, in any case, I should defer tendering advice to Her Majesty in regard to the Act, until the people of the Colony have had an opportunity of expressing their views on the question at a general election.

2. I have also received your dispatches of the dates noted in the margin,[3] covering further petitions and resolutions to the same effect from different parts of the Colony, as well as a memorandum by the 'Citizens' Committee' of

[1] See *Parl. Pap.*, C. 9137.

[2] Ibid., pp. 26 seq.

[3] Of October 13, 27, 27, 29, November 10, 12, and 17, 1898.

St. John's criticizing the terms of the contract from a legal point of view.

3. Sir Francis Evans also, as representative in this country of the Citizens' Committee of St. John's, and on behalf of the holders in this country of Newfoundland Government Bonds, has addressed to me two letters on the subject of the contract, copies of which and of my reply are enclosed.

4. I have not yet, as you are aware, been furnished with an authenticated copy of the Act, and am not, therefore, in a position to advise Her Majesty in regard to it, and as I have not been furnished with the report of your Ministers on the statements and charges contained in the petitions and other documents forwarded to me, it would be more in accordance with the usual practice for me to defer dealing with the Petition until they have had an opportunity of replying to the allegations of the opponents of the Act.

5. As, however, most of the points raised have been fully discussed in the minute of Council of the 30th of April last,[1] and as the main facts are already before me, it does not appear to me desirable, in the present position of affairs in the Colony, to delay my reply to the memorial.

6. The step, which I am urged to take, is one for which there is no precedent in the history of colonial administration. The measure the disallowance of which is sought is not only one of purely local concern, but one the provisions of which are almost exclusively of a financial and administrative character.

7. The right to complete and unfettered control over financial policy and arrangements is essential to self-government, and has been invariably acknowledged and respected by Her Majesty's Government and jealously guarded by the Colonies. The Colonial Government and Legislature are solely responsible for the management of its finances to the people of the Colony, and unless Imperial interests of grave importance were imperilled, the intervention of Her Majesty's Government in such matters would be an unwarrantable intrusion and a breach of the Charter of the Colony.

8. It is nowhere alleged that the interests of any other part of the Empire are involved, or that the Act is in any way repugnant to Imperial legislation. It is asserted, indeed, that the Contract disposes of assets of the Colony over which its creditors in this country have an equitable, if not a legal, claim, but, apart from the fact that the assets in question are mainly potential, and that the security for

[1] *Parl. Pap.*, C. 8867, pp. 37 seq.

the Colonial debt is its general revenue, not any particular property or assets, I cannot admit that the creditors of the Colony have any right to claim the interference of Her Majesty's Government in this matter. It is on the faith of the Colonial Government and Legislature that they have advanced their money, and it is to them that they must appeal if they consider themselves damnified.

9. No doubt, if it was seriously alleged that the Act involved a breach of faith or a confiscation of the rights of absent persons, Her Majesty's Government would have to examine it carefully, and consider whether the discredit which such action on the part of a Colony would entail on the rest of the Empire, rendered it necessary for them to intervene. But no such charge is made, and if Her Majesty's Government were to intervene whenever the domestic legislation of a Colony was alleged to affect the rights of non-residents, the right of self-government would be restricted to very narrow limits, and complications and confusion from the division of authority must arise.

10. In so far as the demand for disallowance is based on criticism of the policy and details of the Act, I have already indicated that where no Imperial interests are involved, or unless the measure was so radically vicious as to reflect discredit on the Empire of which Newfoundland forms a part, it would be improper for Her Majesty's Government to intervene in what is essentially a matter of local finance, the policy of which is a matter for the Government and Legislature of the Colony.

11. But it is alleged, as a further reason for intervention, that though the subject was one of far-reaching consequence to the future of the Colony, no allusion to the contract was made in the speech from the Throne at the opening of the session of the Legislature, and that when it was brought before that body shortly after the beginning of the session, it was pushed hurriedly through both Houses before knowledge of the matter could have reached the voters, and without allowing due time for its consideration.

12. These charges have been dealt with by your Ministers in the Minute of Council already referred to. They are questions affecting the conduct of Ministers in the administration of business for which they are responsible to the Legislature, and if the members of the Legislature have failed to protect the interests and discharge the duties of their position they will have to answer for their failure to their constituents. The fact that the constituencies were not

consulted on a measure of such importance might have furnished a reason for its rejection by the Upper Chamber, but would scarcely justify the Secretary of State in advising its disallowance, even if it were admitted as a general principle of constitutional government in Newfoundland that the Legislature has no right to entertain any measure of first importance without an immediate mandate from the electors.

13. Nor is the fact that I have been urged to advise the disallowance of the Act by petitions alleged to be signed by more than half of the registered electors of the Colony one which can be properly considered by Her Majesty's Government in this connexion. The Act was passed by the Assembly, elected so recently as November, 1897, by an enormous majority, only five members out of a House of 36 voting against it, and in the Legislative Council, as I gather from the last paragraph of your dispatch of April 30,[1] it was received with practical unanimity, only one member having spoken against it, and even he did not carry his opposition so far as to record his vote against the measure.

14. It is not the duty of Her Majesty's Government to attempt the task of deciding whether the action of the Legislature has been in accord with the opinion of the electorate. Even a Governor, who is to some extent in touch with local opinion, would be taking a serious step if, in response to petitions such as have been addressed to me, and against the advice of his Ministers, he refused to assent to a measure of local concern which had been duly passed by the Legislature ; and if he failed to find other Ministers prepared to assume responsibility for his action, and able to secure the support of the Legislature, his position would become untenable. Any such step on the part of a Governor would have to be taken entirely on his own motion. It is essential that for every act of the Governor in local matters full responsibility should attach to a Ministry amenable to the Colonial Legislature.

15. In advising Her Majesty as to the exercise of her prerogative of disallowance, the Secretary of State has to consider the legislation submitted from a still more restricted point of view than the Governor.

16. That prerogative is a safeguard for the protection of those interests for which the Secretary of State is responsible to Her Majesty and to the Imperial Parliament. To advise its exercise in cases where only local interests are concerned

[1] *Parl. Pap.*, C. 8867, p. 37.

would involve the Imperial Government in liability for matters of the control of which it has divested itself, and for which the Colony has accepted full responsibility.

17. In the present circumstances of Newfoundland there are special reasons of the greatest importance which preclude Her Majesty's Government from taking such a departure from recognized constitutional principles and usage as the memorialists desire.

18. You have stated in your dispatch of the 30th of April last, that the language used by the responsible Finance Minister of the Colony, in the speech in support of the Contract which he delivered from his place in the Assembly, implied clearly that if the measure was rejected the Colony would be unable to meet its immediate financial obligations.

19. Neither in your dispatches nor in the memorials is this assertion challenged, and it is obvious that if Her Majesty's Government were to annul a measure seriously declared by the person who is in the best position to know to be essential to the continued solvency of the Colony, the creditors of Newfoundland would not fail to fasten on Her Majesty's Government responsibility for the consequences of their action.

20. As I have already said, the debts of the Colony have been incurred solely on the credit of the Colony, and any step which would transfer responsibility for them in the slightest degree to the Imperial Government would entail consequences which would not be confined to Newfoundland, and which Her Majesty's Government would not under any circumstances be justified in contemplating.

21. The considerations which preclude me from advising Her Majesty to disallow the Act apply equally to the alternative request, that I should defer tendering advice to Her Majesty in regard to it until the people of the Colony have had an opportunity of expressing their views upon the measure.

22. The Act is already in force, and the Contract to which it gives effect has been in part already performed, and the continuing obligation of the Contractor would not be suspended until Her Majesty's pleasure was finally declared. It remains in full force till the Act is disallowed or repealed. It would be unjust therefore to the Contractor, and would only add to the already heavy liabilities of the Colony, to accede to the prayers of the petitions.

23. The question of the propriety of a dissolution is not one upon which I can advise ; it is entirely a matter for the Governor and his advisers.

24. While I am unable to advise Her Majesty to grant the prayer of the petitions, this decision must not be understood as an expression of opinion on the merits of the Contract, or on the action of the Government and the Legislature in connexion with it. My opinion on these points has already been made known to the inhabitants of Newfoundland by the publication of my dispatch of March 23, in which I commented on the extraordinary and unparalleled character of the Contract, and the serious consequences which may result from it.

25. My action has throughout been governed solely by constitutional principles, on which I am bound to act, and I think it desirable that it should be made quite clear that, in accepting the privilege of self-government, the Colony has accepted the full responsibilities inseparable from that privilege, and that if the machinery it has provided for the work of legislation and administration has proved defective, or the persons to whom it has entrusted its destinies have failed to discharge their trust, they cannot look to Her Majesty's Government to supplement or remedy these defects, or to judge between them and their duly chosen representatives.

26. I have to request that you will publish this dispatch for the information of those who have signed the petitions.

There is perhaps no more striking proof of the freedom given in local matters to the Colonies than the treatment of the land question. In 1840 (3 & 4 Vict. c. 35) and 1847 (10 & 11 Vict. c. 71) the Canadian Parliament received complete control of the lands which were situated in those provinces, and the plan adopted in every case of the grant of responsible government to the Maritime Provinces took the form of a grant of full rights over the lands in exchange for a civil list. In 1847 two Acts of Nova Scotia regarding Crown lands failed to obtain the royal assent, but after an Act of 1848 (c. 21) an Act of 1849 (c. 1) was assented to, and therefore the matter was disposed of. In 1851 (c. 3) the control of lands in Prince Edward Island was surrendered in exchange for a civil list. In 1852 an Imperial Act was passed to make good the grants in these cases, as it had been realized that the Crown in the United Kingdom had surrendered to the consolidated fund by the operation of the

Civil List Acts (1 Will. IV. c. 25; 1 & 2 Vict. c. 2) the funds in question, and the Act of 1852 (15 & 16 Vict. c. 39) recites the fact that grants had been made without authority, and required the confirmation which it proceeds to give.

In 1852 the power to deal freely with land, subject only to existing rights of the New Zealand Company, was given to New Zealand, though only to the central Legislature,[1] and in 1856 an Act to confer on the provincial councils to enact laws for regulating the sale, disposal, and occupation of the waste lands of the Crown was disallowed. In 1855[2] the land of the Australian Colonies was thrown open to the administration of the Governments and Legislatures, though the land in Western Australia was kept under the Imperial control, as that Colony was still without responsible government.[3] In South Africa the Cape in 1872, and Natal in 1893 were in full possession of the Crown revenues which had been accorded them with representative government.[4] In the case of the Transvaal and the Orange River Colony, while the general land control was surrendered, a curious position was left with regard to land settlement. Special provision was felt to be necessary for the continuance for a period of the power of the Governor over the lands which had been occupied by settlers introduced originally more or less deliberately to act as a counterpoise to the Boer population, and who from various causes would have been likely to suffer severely if left to a government merely careful of their legal

[1] 15 & 16 Vict. c. 72, ss. 72–8. S. 73 saved native rights, but was repealed (under the authority of 25 & 26 Vict. c. 48) by *The Native Lands Act*, 1873, s. 4. Cf. also *Wallis* v. *Solicitor-General for New Zealand*, [1903] A. C. 173; and see 29 N. Z. L. R. 1123. For the other sections see *Constitution and Government of New Zealand*, p. 11. The surrender in New Brunswick in 1837 (8 Will. IV. c. 1) is described by Hannay, *New Brunswick*, ii. 1 seq., and see 3 Cart. 20 seq.

[2] 18 & 19 Vict. c. 56. Cf. also Forsyth, *Cases and Opinions on Constitutional Law*, pp. 174–6.

[3] It was given power by 53 & 54 Vict. c. 26, on the grant of responsible government.

[4] In Natal a trust existed as regards native lands under royal letters patent. It was made statutory by a Natal Act (No. 29) of 1910 just before union. Legislation regarding native lands required reservation.

rights. The following provision appears in the Transvaal letters patent of December 6, 1906 :—

LII. (1)—(*a*) There shall be established in the Colony on the appointed day (as hereinafter defined) a Board, to be called the Transvaal Land Settlement Board, for the purpose of exercising and discharging, in respect of the lands hereinafter mentioned and the persons in occupation of them, the rights and duties conferred and imposed upon the Government of the Colony or any Member thereof by any law of the Colony or by any Agreement between such persons and the Government.

(*b*) The Board shall be a Body Corporate, and shall consist of three Members, resident in the Colony, one of whom shall be Chairman. The Chairman and Members of the said Board shall be appointed by the Governor, and shall hold office during his pleasure, and be paid such salaries as he may determine.

If any vacancy arises on the Board, the Governor shall appoint some other person residing in the Colony to fill such vacancy.

(*c*) It shall be lawful for the Governor to appoint, at such salaries as he may determine, such officers as may be necessary to assist the Board in carrying out the purposes for which it is established, and to make rules and regulations—

(1) For the proper discharge by the Board and the aforesaid officers of the duties imposed on them ;

(2) For the proceedings of the said Board ;

(3) For the proper keeping of and auditing of the accounts of the said Board.

(2)—(*a*) There shall, on the appointed day, be transferred, without payment of transfer duty, stamp duty, or registration charges in the Deeds Office of the Colony, to and in the name of the Board and for the purposes aforesaid, such of Our lands in the Colony as are on the appointed day held by settlers on the conditions prescribed in the Ordinance of the Colony intituled 'The Settlers' Ordinance, 1902 ', or by settlers to whom advances have been made out of such portion of the loan authorized under the Ordinance of the Colony intituled the ' Transvaal Guaranteed Loan Ordinance, 1903 ', as has been allocated to land settlement in the Colony.

(*b*) There shall further be transferred, on the appointed day, to the Board for the aforesaid purposes, all movable property vested in the Government of the Colony and used in connexion with the said lands, and all rights and obliga-

tions acquired or incurred by the Government against or towards the persons in occupation of the said lands and in respect thereof.

(*c*) There shall further be transferred to the Board for the said purposes, and more especially for the purposes of making advances under the authority of the said Settlers' Ordinance to the persons in occupation of the aforementioned lands, all moneys paid to the said Government by such persons as aforesaid in discharge of their obligations to it, and held by it on the appointed day for or on account of land settlement, and any balance of money appropriated by the Intercolonial Council to the said Government out of the loan authorized by the 'Transvaal Guaranteed Loan Ordinance, 1903', for the purposes of land settlement, together with such further sums as may be approved by a Secretary of State, out of moneys hereafter appropriated to the Government by the said Council for land settlement purposes.

(3) The said Board may, with the approval of the Governor, exercise all the rights and discharge all the duties conferred and imposed by law or agreement on the Government of the Colony, or any Member thereof, in respect of the aforementioned lands and the persons in occupation of them, and may appropriate to such purposes and generally to the cost of carrying out this section any moneys paid to it after the appointed day by such persons as aforesaid in discharge of any obligations incurred by them to the Government, as well as any moneys transferred to it under subsection 2 (*c*) of this section.

(4)—(*a*) The rights, powers, and duties conferred and imposed by this section on the Board shall be determined on the expiration of five years reckoned from the appointed day; Provided always that it shall be competent for the Government of the Colony to make an agreement, subject to the consent of the Governor and with the approval of a Secretary of State, with the Board in respect of the matters referred to in this section whereby the said rights, powers, and duties aforesaid shall be sooner determined.

(*b*) On the determination of the said rights, powers, and duties the Board shall transfer to the Governor in Council the aforementioned lands registered in its name and all movable property, moneys, rights, and obligations acquired and incurred by it under the provisions of this section, and the Board shall thereupon be dissolved.

(5) The appointed day shall be such day as may be proclaimed by the Governor in the *Gazette*.

It is, of course, easy to censure the Governments which determined to leave these vast areas of land to the free disposal of the young community; the lands were not the things to give away, in the opinion of Lord Durham, and it may be said that to grant them absolutely to small communities was merely to discourage expansion by settlement and immigration, for those communities were not specially anxious to spend the revenue accruing from the lands in the effort to secure larger populations, which would interfere in some degree with rates of wages and the prospects of those in the country. Moreover, Canada has not adopted the British ideas in dealing with the land in the new provinces; Manitoba received no public lands when it was created, and if a more generous arrangement was made in 1885 [1] it was merely to transfer a portion of the lands, those known as swamp lands, to the jurisdiction of the province; Alberta and Saskatchewan received no lands, and the Dominion thus has had the responsibility of settling the North-West.

It has been argued often of late [2] that the system has been improvident, that lands should have been retained in the ownership of the Imperial Government and used by that Government for the settlement of the indigent population of the British Islands. It is also pointed out that though Canada has now adopted a vigorous policy of encouraging immigration, still it offers very good terms not merely to British settlers but also to settlers from the United States, and that it builds up Canada with a population which is in large measure alien, even if it becomes Canadian by naturalization, and that it tends to weaken the British connexion in Canada. In the case of Australia stress is laid on the fact that the Governments there do so little for immigration, that before the proceeds and control of the

[1] See Canada Act 48 & 49 Vict. c. 50; Manitoba Act 49 Vict. c. 38; *Attorney-General for Manitoba* v. *Attorney-General for Canada*, 34 S. C. R. 287; [1904] A. C. 799; cf. *Canada Gazette*, xliv. 3210–2; *Manitoba Free Press*, March 24, 1911.

[2] The older discussions in Earl Grey, *Colonial Policy of Lord John Russell's Administration*, and in Adderley's *Colonial Policy*, are of value.

land revenues were handed over a half used to be applied by the Imperial Government towards the cost of immigration, and stress is laid upon the danger to the Empire and to the Commonwealth alike of the presence of a vast territory which is quite undefended against any serious attack, as the forces available, however well trained, would be unable to protect it if any enemy could get control of the sea. Nor indeed is there any doubt that in population lies the strength of nations, or that a completely trained Australian population would yet be useless if the sea fell under the command of another nation.

On the other hand, the facts are very simple. It was contemplated, in the negotiations which led up to the transfer of Western Australia to responsible government, that the northern part of the territory should be put apart and the proceeds of the land there kept for the benefit of a future new colony.[1] But as the Governor pointed out, the proceeds were inadequate to cover the cost of such administration as there was, and therefore there could be no saving them for a future colony. In fact the lands were the only source from which revenues for the development of the colony could obviously be obtained, and if a colony had not been granted the lands it would have required, as the Canadian Provinces which had no lands required, grants from the central exchequer to keep them going. But such grants were obviously, as has been time after time asserted in the most emphatic terms by the Imperial Government, entirely opposed to the principle of the existence of self-government, and therefore self-government could not have been accorded without giving the control of the land revenue which the Crown possessed. And again, it is very doubtful whether it would ever have been possible to manage Colonial land successfully, even had the question of revenue come in, by means of a Government which was not the Government for local matters of the Colony. In a Colony it is difficult to imagine effective legislation which did not touch land interests, and if land were to be regulated the Imperial

[1] *Parl. Pap.*, C. 5743, 5752, 5919, and 5919 I.

Government would have had either no real control over land, or it would have had to interfere with the legislation and administration of the Colony to an extent which it would be very difficult to justify. It is true that Canada manages to control lands despite the existence of the provinces, but the legislation of the provinces occupies a very much smaller sphere than that of a Colony, and again Canada, as being a superior government of the country, can control the provinces in a way which would never have been possible to an Imperial power which had no direct share in the ordinary government of the country. Moreover, the restoration of provincial control is a 'plank' in the platform of the Conservative party in Canada, and some measure of concession to the North-West was foreshadowed in the election policy pronouncements in 1911 of the government.

The complete abnegation of Imperial control over internal matters may perhaps be best illustrated by the legislation regarding Colonial stocks and investments of trust funds. Since the Act of 1900 the Imperial Government allows Colonial stocks to be ranked as trust-fund investments conditionally on certain arrangements being made, which include a promise by the Government to keep funds in London available for payment in case any judgement is given in respect of the stocks by the Courts, and a statement by the Government that any legislation conflicting with the obligations imposed would properly be disallowed.[1]

[1] See *Parl. Pap.*, H. L. 189, 1877; C. 6278; H. L. 169, 1892; H. C. 276, 1893; H. C. 300, 1900. It should be noted that, as the Imperial Government has no direct control over provincial Acts, it has never been found possible to admit the securities of the Canadian provinces to the benefits of the enactment. See Canada *Sess. Pap.*, 1900, No. 139.

CHAPTER III

THE TREATMENT OF NATIVE RACES

§ 1. Reservation of Bills

While the Imperial Government has always been marked for the great attention which it has paid to considerations affecting the treatment of natives in the Crown Colonies, it is at first sight curious that there should be so little provision in the royal instructions for the reservation of measures affecting natives. There is nothing at all in the royal instructions for Canada or Newfoundland; nothing in the case of the Commonwealth of Australia or the Australian states, or the Dominion of New Zealand, and the only provisions were those inserted, first in the Natal royal instructions of 1893, and then in the Transvaal and Orange River Colony letters patent of December 6, 1906, and June 5, 1907, respectively, which required the reservation of Bills differentially affecting persons not of European origin or descent. In the case of these three Colonies there were further provisions, for it was expressly laid down in the case of Natal in the royal instructions that in matters in which the Governor acted as Supreme Chief of the natives he should communicate what he intended to do to his Ministers before acting, but that the final decision must rest with him and not with ministers. In the latter two cases it was provided, in the letters patent granting responsible government, as follows :—

LI. (1) The Governor shall continue to exercise over all chiefs and natives in the Colony all power and authority now vested in him as Paramount Chief.

(2) The Governor in Council may at any time summon an assembly of native chiefs, and also, if it shall seem expedient, of other persons having special knowledge and experience in native affairs, to discuss with the Governor, or such representative as the Governor in Council may

appoint, any matters concerning the administration of native affairs or the interests of natives, and the Governor in Council shall consider any reports or representations submitted to him by any such assembly, and shall take such action thereupon as may seem necessary or proper.

(3) No lands which have been, or may hereafter be, set aside for the occupation of natives shall be alienated or in any way diverted from the purposes for which they are set apart otherwise than in accordance with a law passed by the Legislature.

§ 2. Canada

For a time in the case of Canada there was maintained at the expense of the Imperial Government a native department which dealt direct with the natives, and for which funds were provided by Her Majesty's Government. The position was clearly quite anomalous, and naturally it did not last long, for in 1860[1] the arrangement was cancelled, the Imperial Government ceased to make payments on behalf of Indians, and ceased to exercise any control whatsoever over the Indians. The administration of the Indians was reserved by the *British North America Act* for the Parliament of Canada, which, by s. 91 (24), alone has legislative authority in connexion with the Indians, and exercises in accordance with that power executive authority.[2]

The Indians, under the rule of the Dominion, have prospered, and the treatment has been most successful. Great care has been taken to preserve for them suitable lands for their occupation and to prevent the alienation of these lands without proper precautions. On the other hand, treaty after treaty is made to secure the surrender of their peculiar interests, a process rendered difficult by the fact that the provinces have by law the beneficial interest in all lands over which the Indian title is extinguished, and the Dominion cannot be expected to secure the surrender of lands without

[1] See the correspondence for 1854–60 in *Parl. Pap.*, H. C. 247, 1856, and 575, 1860. For the position of the Indians in 1877, see *Sess. Pap.*, 1877, No. 11. For the Esquimaux, cf. Bernier, *Cruise of the Arctic*, 1908–9, pp. 316 seq.

[2] See *Revised Statutes*, 1906, c. 81, amended in 1910 (c. 18) and in 1911.

some recompense. The only serious difficulties which have arisen are in connexion with lands for native Indians in British Columbia, as it is alleged by the Indians that the British Columbia Government has not assigned to them adequate lands for their maintenance, while it is claimed by the Provincial Government that adequate lands have been so assigned, and the matter is to be referred to the decision of the Supreme Court of Canada, from which appeal lies of course to the Privy Council.[1]

The general policy[2] of the Canadian Government with regard to the Indians has been to secure them adequate reserves of land for their habitation, and it has taken the pains to prevent their being subject to unfair treatment in any of the provinces of the Dominion. The Dominion Constitution also leaves the Indians in the same position as any other persons with regard to the franchise, but there are certain restrictions in some of the provinces with regard to the Indians being enrolled as electors, though these restrictions are only partial. With the exception of the disturbance of 1870 on the taking possession by Canada of the lands of the Hudson Bay Company, and the North-West rebellion of 1885, which was undoubtedly caused by some lack of tact on the part of the Dominion Government, but which affected the French half-breeds much more than the pure Indians, most of whom took no share in it, there has been almost no breach of the peace in Canada.

Pains are taken to secure the useful employment of the funds arising out of Indian lands, and of subsidies granted by the Dominion Parliament and the Department of Indian Affairs, which is under the Minister of the Interior, who is Superintendent of Indian Affairs, and is fully qualified to deal with all problems arising with regard to the Indians. Annual reports of the progress of the Indians are issued,

[1] Papers have been published by the British Columbia Government on the topic (1907, F. 33; 1908, D. 47). For the legal question of the land rights see above, Part IV, chap. i; Ontario *Sess. Pap.*, 1908, No. 71.

[2] See the Annual Reports of the Indian Department; for their disabilities in electoral matters see above, Part III, chap. vi; cf. also Nova Scotia Act, 1911, c. 2, as to education.

which show that much is being done to improve the material conditions, though unfortunately it is doubtful whether the future for the Indian people can be satisfactory, as the native virtues of the Indians have disappeared, in a large measure through contact with the whites, and the population appears to tend to decline. It is still, however, of great value in the unorganized territories of Canada, in which it is carefully superintended by the Canadian Government, which has created a police force of almost unequalled capacity and ability to deal with the Indians. There is also a possibility of advantages accruing to them from the construction of the railway of the western provinces to the Hudson Bay.[1]

In the case of Newfoundland and Labrador the local Government has also had full control of the natives. In Newfoundland itself there is a native settlement which is not very prosperous, though that does not appear to be any fault of the Government. An interesting report on its condition was given in a report of a visit paid in 1908 to the Micmac Indians by Sir W. Macgregor.[2]

In Labrador the Indians form a more important part of the population, but Labrador is almost destitute of regular government. Its present condition is fully described in an elaborate report made by Sir W. Macgregor which was presented in 1905 to the Parliament of Newfoundland. Good results for natives and Europeans alike are being achieved by Dr. Grenfell's famous mission, and an Act of 1911 prevents the exploitation of natives for exhibition purposes.

§ 3. New Zealand

In the case of New Zealand,[3] for a time the Imperial Government exercised a control over the natives directly.

[1] The land legislation of Canada was amended in 1911 in Indian interests. When land is needed it is acquired by the Government, which sees that adequate lands are left in Indian hands. Cf. *House of Commons Debates*, 1910–1, pp. 7785 seq.

[2] *Parl. Pap.*, Cd. 4197.

[3] See accounts of Maori progress in the *Official Year Book*, and in the annual reports of the Minister for Education. Rusden's *New Zealand* is an indictment of the misgovernment of the whites, and cf. Sir A. Gordon in *Parl. Pap.*, C. 3382. But things have changed for the better since 1884.

On the grant of responsible government the Governor claimed to reserve the native question for Imperial control, and it was not until 1861 that Sir G. Grey abandoned this policy. The attempt to control native policy was due to the presence of Imperial troops, and the quarrels of the period from 1862 to 1869 must be elsewhere alluded to. Suffice it to say that the policy of Imperial interference was a complete mistake, and the Imperial Government recognized it at a very early date, but the settlers were deficient in self-reliance, and Sir G. Grey was a difficult man to deal with. The *Constitution Act* of 1852 expressly provided, and the section has never yet been repealed, that Her Majesty, by letters patent under the Great Seal of the United Kingdom, might make provision from time to time to maintain the laws, customs, and usages of the aboriginal and native inhabitants of New Zealand so far as they were not repugnant to the general principles of humanity, for the government of those natives in their relation to and dealing with each other, and to set apart particular districts within which such laws and customs should be observed. The Crown has still power to take this step, whether the native laws, customs, or usages are or are not repugnant to the law of England or to any law or statute in force in New Zealand ; but of course the power is never exercised, and the government of the Maoris has been entrusted wholly to the discretion of the Government of New Zealand ; that discretion has been wisely exercised. The decline of the native population has ceased. There are signs that it is steadily rising. It can hardly be denied that their ultimate destiny is through intermarriage union with the rest of the people of New Zealand, though the process may be a slow one. It is not probable that they will remain a purely native population, and there is no reason to desire such a result. Since 1872 there have been two chiefs on the Legislative Council. There are four Maori members of the House of Representatives, the number having been fixed since 1881, in which year there were 91 Europeans and 4 Maoris ; in 1890 the Europeans were reduced to 70, and in 1900 raised to 76, but no change in the

number of Maori members was made. No registration is required among the electorate, which consists of Maoris, and since 1893 the Maori women enjoy the suffrage. Of recent years the interest in elections seems clearly to have increased, and the recent Royal Commission in 1910 revealed a good deal of jobbery of quite a European type. In 1909 Sir J. Ward urged the success of the Maori vote as a reason for providing representation for the natives by natives if desired in the Parliament of the Union of South Africa, and Sir J. Carroll, who is part Maori, has several times acted as Premier.

The policy adopted by the Government has been to maintain the native land laws, which have, however, been modified from time to time and have been finally codified in 1909 by the native member of the Executive Council. Moreover the Executive Council and the Legislative Council, like the Lower House, contain Maori members.

The acquisition of land [1] from the Maoris is conducted through the Government, and, thanks to its policy, large quantities of land are being made available for European settlement without trenching on the lands which are necessary for the Maoris to live upon, for the lands still in their possession and assured to them by the Treaty of 1842 and subsequent legislation (the Treaty in itself not being sufficient to confer a paramount right) are very much greater than can be turned to profitable use by their Maori owners. The mode of acquisition of land makes suitable provision to secure that the funds obtained by the disposal of the land to Europeans may not be wasted by the recipients, but that part at least shall be invested for their permanent benefit.

From time to time petitions have been addressed to the Imperial Government by New Zealand Maoris, asking that His Majesty the King should interfere in some way or other

[1] See the excellent Land Act, No. 15 of 1909; No. 82 of 1910; *Parl. Pap.*, Cd. 5135, p. 17; see also on the land laws *Willoughby* v. *Panapa Waihopi*, 29 N. Z. L. R. 1123. Cf. *Nireaha Tamaki* v. *Baker*, [1901] A. C. 561, where *Wi Parata* v. *Bishop of Wellington*, 3 N. Z. J. R. (N. S.) S. C. 72; *Reg.* v. *Symonds*, *Parl. Pap.*, December 1847, p. 64, are carefully considered.

with the land policy of the New Zealand Government, on the ground that they are under the direct sovereignty of the King, which they accepted by the Treaty of 1842. These petitions have from time to time been answered, as in 1908, by a statement that the matter is essentially one for the Government of New Zealand, which may be trusted to secure the rights and interests of the Maori population. Indeed, the presence of Maori members in both Houses and on the Executive Council appears to have solved, in a particularly ideal manner, the difficulties inherent in the management of natives.[1] It is, too, fortunate that the Maori people are singularly courageous, and so in the early days won the respect of the white colonists, and at the same time capable of intellectual advancement, so that there never has been substantial difficulty in securing Maoris or semi-Maoris to be members of the Executive Council of the Dominion.

New Zealand has dependencies in the shape of the Cook Islands.[2] These islands are of course subject to the general legislative power of the Parliament of New Zealand, but they possess also in themselves a Federal Parliament for the Cook Islands, created by an Act of 1901, and several native Councils. The construction of the Island Councils was altered in 1904, and each Council now consists of nine members, the Resident Agent of Government being *ex officio* member and President, the Arikis being *ex officio* members, and the remaining members being elected by the adult natives of the Islands for a term not exceeding three years. The Federal Council enacts laws for all the Islands except Niue, while each Island Council can make Ordinances. No Ordinance has the force of law until assented to by the Governor, and the Governor, by Order in Council, can direct that any of the laws in force in the Islands at the

[1] The Constitution of 1846 (9 & 10 Vict. c. 103), which never took effect, would have excluded Maoris *de facto* from the franchise, and that of 1852 left the position unsatisfactory. The present system of separate representation is clearly satisfactory to all concerned.

[2] See New Zealand *Official Year Book* for an annual account of the progress of the islands; *Consolidated Statutes*, 1908, No. 28.

commencement of the principal Act can be repealed or modified, and he can also apply to the Islands any law in force in New Zealand either in whole or with modifications, excepting the laws relating to alcoholic liquors, the *Licences Act*, 1908, containing special provisions for this matter. The Customs Tariff applies generally, but can be modified by the Governor in Council. There is a High Court in the Islands except Niue, and there used to be Ariki's Courts, which still exist except where there is a European Resident Agent, who now exercises the powers formerly exercised by such Courts. In 1903 Niue was placed under a separate administration, and the High Court of the Cook Islands ceased to have authority over it. The Islands have been developed gradually, but every care has been taken to secure to the natives their land, while they have been induced to lease considerable areas in Rarotonga. The experience of the Government is an interesting one, and so far has been on the whole a marked success.

§ 4. Australia

In the Commonwealth of Australia there has been little trouble with regard to the treatment of aborigines since responsible government in the Eastern States.

In Tasmania the aboriginal has at last, since 1876, totally disappeared. There are a few half-castes.

In New South Wales, which has legislated exhaustively in 1909 (Act No. 25), and Victoria, where there is an Act of 1890 (No. 1059), extended by an Act of 1910 (No. 2257) to half-castes, aborigines are fast vanishing, protected from an immediate extinction only by the action of the State Governments, which have bought them reserves adequate for their maintenance. In 1909 the expenditure of the two states was £26,000 and £4,400 respectively for 7,000 and 265 aborigines.

In South Australia, on the other hand, the number of aborigines in the northern territory is unknown; in any case it must be very considerable, and the provisions made for their control have, in view of the almost total lack of administration in any but a small portion of that territory,

been very defective, only £1,400 being spent on the natives there in 1909. Moreover, legislation has been hampered by the prospect of the transfer of the territory to the Commonwealth of Australia, which has now been accomplished, but a Bill was introduced into the Parliament in 1910 making elaborate provision for the safety of the aborigines in the state proper, and their prevention from obtaining drink, and protecting them against illegal and unsatisfactory treatment.[1] That Bill was dropped to be reintroduced in 1911, but an elaborate Bill regarding the Northern Territories natives became law as Act No. 1024 and the Commonwealth promises an active policy.

In Queensland the aborigines are quite an important section of the people, and many of them are employed in the pearling industry. There is a department entrusted under Acts of 1897 (No. 17) and 1902 (No. 1) with the protection of aborigines, which looks after them when destitute, and endeavours to secure that suitable lands are placed at their disposal. The expenditure in 1909 was £13,200 for 20,000 natives.

In Western Australia matters have been different. During the discussions which preceded responsible government it was laid down by the Governor, Sir F. Napier Broome, and accepted by the Secretary of State for the Colonies, as an essential arrangement that the control of aborigines should be entrusted to a Board, which had been created in 1886, and that this Board should remain under the Governor independent of all control by the Government.[2] The arrangement was naturally not very acceptable to the people of the Colony, whose inability to manage their affairs in this regard was thereby proclaimed. But it was inevitable that the steps should be taken at the time, for there had been too many cases of flagrant disregard of justice in the treatment of natives; the natives were often without lands, and

[1] *House of Assembly Debates*, 1910, pp. 647 seq., 673 seq., 696 seq., 709, 721. The annual reports of the Protectors of Aborigines in Victoria, Queensland, and Western Australia give full information as to natives there; see also Queensland *Parliamentary Debates*, 1910, pp. 1032 seq., 1610 seq.

[2] *Parl. Pap.*, C. 5743.

in the habit of stealing and killing the cattle of the settlers; to the settlers this meant ruin, and this position was serious for the individual settler. If, therefore, his conduct towards the native was often absolutely inexcusable, it must be realized that he was in a difficult position, and that he often seemed to have no option between allowing himself to be ruined or punishing the natives in the most brutal manner, and he might rest fairly secure that whatever action he did would be condoned or made little of by a jury of his neighbours, who, like himself, were exposed to native depredations.

The Native Department as constituted did not work satisfactorily. The Governor, indeed, had full control of it, and a sum of £5,000 was placed at his absolute disposal for the benefit of the natives. The sum was wholly inadequate if anything substantial were to be done for them. If nothing substantial were to be done it was hardly worth while making provision. Moreover, the Government resented the condemnation of their authority, and took care not to co-operate with the proposals of the Governor. The position was always unsatisfactory, as creating the feeling by the Government that they were not wholly in the confidence of the Governor, and they alleged that the division of authority was as injurious to the natives and the aborigines as it was inconvenient and derogatory to the dignity of the Colonial Government. An Act (No. 37) to amend the Constitution in this regard, brought in in 1894, was reserved and did not receive the royal assent. At last Sir John Forrest, in 1897, on the occasion of the Colonial Conference of that year, induced the Secretary of State for the Colonies to consent that the Department should cease to remain independent of the Colonial Government and it should fall under that control in the ordinary way.[1] It was urged by Sir John Forrest among other things that the feeling in the Colony was

[1] See *Parl. Pap.*, C. 8350. The Act of 1897 (No. 5) was not duly proclaimed when assented to under the Act of 1842, and so it was re-enacted with modification in 1905 (No. 14), and this Act—on the whole excellent—has been amended in 1911 (No. 43).

changing, and that there was now a different regard for the interest of natives, which would justify the Secretary of State in leaving to the people of the Colony the fullest rights in the matter. This accordingly was done by a Colonial Act.

It cannot be said that the treatment of the aborigines, as described in the reports of the Protector of Aborigines in the Colony, has been very satisfactory since the Colonial Government took over their management ; but it would be equally impossible to say that it has been less satisfactory than it was originally. The difficulties, indeed, are not such as any Government can pretend to be able to dispose of in a day. They rest in the habits of the aborigines and the nature of the white population. Exploring expeditions have often ill-treated natives, and the legal procedure of handcuffing natives and conveying them miles to prison has resulted in many abuses. Fortunately a new departure was made in 1910 by the Government in the direction of providing large reserves with cattle for the aborigines who are thus, if they so desire, able to live on the land allotted to them with their herds of cattle, instead of making depredations on the herds belonging to the white population. Unhappily here, as in the West of Australia, the aborigines appear unlikely to make any progress towards modern civilization. In Western Australia, the northern territory of Australia, and in Queensland, the aborigine is debarred entirely from the franchise, but he shares his disability along with Asiatics,[1] Africans, and natives of the Western Pacific, and even the Maoris.

In 1905 a valuable Act was passed which made provision for the protection, in many respects, of the aborigines, and there can be no doubt that the prospects of that population are much better now than they were formerly. Food and clothes are provided for indigent and infirm natives ; they are protected against ill-treatment and fraud by their employers. In 1911 the Act was amended to extend the powers of the Protector over half-caste children, to enable them to be

[1] See above, Part III, chap. vi. He has still a freehold qualification for the Legislative Council of Western Australia.

brought up to better prospects than those of the native method, and to enable the Government to increase the areas set apart as reserves beyond 2,000 acres. The Act also forbids a native to plead guilty of any offence without the sanction of the Protector, a necessary precaution, as the native is anxious to please.

The expenditure on the aborigines in Western Australia, which was £15,125 in 1906, was raised to £17,949 in 1908, while the total expenditure in 1906 for the whole of the Commonwealth was over £56,000, and now exceeds £63,000.

The Commonwealth itself possesses, in Papua, a large area of which the population is and must be mainly native. The administration of Papua and the legislation is conducted on the approved Imperial models. Efforts to induce the permission of compulsory labour, whether directly or indirectly, have failed, and the declared policy of the Commonwealth is to develop Papua with all due regard to the interests of the native race.[1] It has, accordingly, declined to sanction proposals mooted from time to time for systems of compulsory labour, and has refused to sanction the importation of indentured coolies, which has been tried successfully in Fiji, but which has in its view tended to diminish the prospect of the successful advancement of the native race. Geographically more connected with New Zealand, Norfolk Island is a quasi native community derived from Pitcairn, and is now ruled by the Governor of New South Wales, who is allowed by his Ministers a free hand. He has full legislative authority by virtue of an Order in Council under an Imperial Act of 1856.[2] Ultimately, transfer to the Commonwealth seems desirable if it can be accompanied by free access to Commonwealth markets, which is denied on the 'White Australia' policy to products grown by native labour in Papua.

[1] For native labour, cf. two reports presented to the Commonwealth Parliament in 1910, Nos. 60 and 63, and see the *Handbook of Papua*; *Parl. Pap.*, 1909, No. 76; 1910, Nos. 14 and 74.

[2] See *Parl. Pap.*, C. 4583, 4193, 4842, 8358 (transfer to New South Wales: curiously enough, the Ministry seem to have allowed the Governor to do what he likes); above, p. 914, n. 1; Denison, *Viceregal Life*, i. 337 seq.

§ 5. South Africa

In the case of South Africa the problem of the treatment of the native race was elaborately solved in the period 1850–3, when the representative constitution was granted, by providing that the natives should have the electoral franchise on precisely the same conditions as Europeans. This principle has not been substantially departed from since, though it was modified in 1892 by the Rhodes Ministry in accordance with Rhodes' doctrine of equal rights for equal civilisation to the extent of securing that mere qualification in respect of property through a tribal tenure should not be sufficient to entitle a native to the vote, thus excluding from the suffrage the uncivilized Kaffir. Moreover, the requirement that the elector shall be able to sign his name secures that a certain minimum of education shall exist. Subject to these restrictions, the fairness of which is obvious, the native vote has been unrestricted, and in 1909 there were about 22,000 voters. The results have been equally satisfactory. It is true that objection [1] has been felt to the fact that on the native vote in the several constituencies in which it is important might depend the decision as to those seats, and ultimately the fate of one or other of the great parties, but on the whole the native vote has served admirably its purpose of securing that no anti-native legislation shall be passed.

In the case of Natal, where the franchise was practically denied,[2] being made dependent on almost impossibly stringent conditions and on the approval of the Governor in Council, it was deliberately intended to secure for the Governor an independent position with regard to measures affecting the native population; but whereas in the case of Western Australia the position was not absolutely impossible, inasmuch as he was provided with an Aborigines Board which could exercise a considerable executive authority, and could

[1] See *Parl. Pap.*, Cd. 2399, pp. 65 seq., for views of Native Affairs Commission of 1903–5. For recent progress, see Cape *Parl. Pap.*, A. 2 and G. 19, 1909; G. 26, 1910. Cf. also Wilmot, *South Africa*, ii. 173 seq., 196 seq.; iii. 22 seq., 36; Vindex, *Cecil Rhodes*, pp. 361 seq.

[2] Cf. *Parl. Pap.*, Cd. 2399, pp. 31, 65 seq.

carry out the wishes of the Governor; in the case of Natal the Governor had the abstract right to act, but with no adequate security that his wishes would be carried out by the officers in question. No doubt, strictly speaking, the officers of the Government as officers of the Crown were bound to obey the Governor, but for practical purposes theoretical obligations of that type are inadequate. At any rate, practice showed that the Governor made no effort or could make no effort to act independently of ministers, and both the report of the Native Affairs Commission and the authors of *The Government of South Africa* state, as a matter of fact, that the Governor acted on ministerial advice.[1] Indeed, so unsatisfactory was the conduct of the native affairs in Natal, according to a Royal Commission appointed in Natal, that it would be a poor compliment to assume that the result was due to the action of the Governor.

The experience of Government in the Transvaal[2] and the Orange River Colony, where the Boer governments recognized no equality of white and coloured in church or state, was too short to allow of any opinion being expressed with confidence as to whether it would have developed in any definite direction. It is not known that any divergence of policy between the Governor and the ministers arose during the continuance of the position.

In the case of the Union of South Africa there is, of course, no attempt to control the Union in native matters; the point was raised in Parliament on the debate on the South Africa Bill, only to be at once brushed aside by the Under-Secretary of State for the Colonies. It is clear that the Government of a new dominion must be assumed to be competent in such matters. It is, however, provided by s. 147 of the *South Africa Act* that the control and administration

[1] See *The Government of South Africa*, i. 133 (correcting i. 22), and clause vi of Royal Instructions, July 20, 1893. Cf. *Parl. Pap.*, Cd. 3889, pp. 13 seq., where it is pointed out that the Parliament was an oligarchy as regards the natives, and a scheme of reform suggested, resulting in legislation in 1909 (No. 1) and 1910 (No. 29).

[2] For the amelioration of conditions on annexation, see *Parl. Pap.*, Cd. 714, 904.

of native affairs throughout the Union shall vest in the Governor-General in Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies, or exercised by them as Supreme Chiefs, and any lands vested in the Governor or Governor in Executive Council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may have hitherto been exercised by any such Governor or Governor in Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated, except by an Act of the Colonial Legislature, shall be alienated, or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.[1]

The position, however, is quite different with regard to the eventual transfer of the territories now under the protection of the Crown or in the possession of the Crown in South Africa.[2] In that case, under the Schedule to the *South Africa Act*, the Governor-General in Council is to be the legislative authority, and may by proclamation make laws for the good government of each territory; provided that all such laws shall be laid before both Houses of Parliament within seven days after the issue of the Proclamation, or, if Parliament is not in session, within seven days after the beginning of the next session. Such laws will cease to have effect if both Houses of Parliament by resolution request the Governor-General in Council to repeal them; in which case the repeal will be carried out by proclamation.

Moreover, His Majesty may disallow any law made by the Governor-General in Council by proclamation for any

[1] For the franchise question, see Part IV, chap. iii. Act No. 23 of 1911 of the Union unites the branches of the Dutch Reformed Church, but excludes native members in the Cape from equality in the other provinces.

[2] Namely, the Bechuanaland Protectorate, Swaziland, a Protectorate taken over from the Transvaal on the conquest of that country, and the Colony of Basutoland, disannexed from the Cape in 1883. For all these the Crown now legislates by Order in Council, and the High Commissioner for South Africa legislates by proclamation; see *Parl. Pap.*, H. C. 130, 1905.

territory within one year from the date of the proclamation, and such disallowance on being made known by the Governor-General by proclamation shall annul the law from the date when the disallowance is proclaimed. This procedure provides that the legislation shall not be counter to the wishes of the Parliament of South Africa, and yet at the same time secures that the Imperial Government shall have a negative voice in legislation affecting the territories. The principle is clearly a compromise, but it is one which should be satisfactory to both parties.[1]

The administration of the territories is entrusted to the Prime Minister of the Union, who, however, is to be advised by a permanent Commission consisting of not fewer than three members, with a secretary to be appointed by the Governor-General in Council, who shall take the instructions of the Prime Minister in conducting all correspondence relating to the territories, and shall have under the like control custody of all official papers relating to the territories. The members, who are appointed in the same way, shall be entitled to hold office for a period of ten years, which period may be extended to successive further terms of five years. They shall be entitled to fixed salaries which cannot be reduced during their tenure of office, and they shall not be removed from office except upon addresses of both Houses of Parliament. They shall not be eligible to become members of either House of Parliament. One of the members shall be appointed to be Vice-Chairman, and two members of the Commission, with the Prime Minister or his deputy, form a quorum, unless the Commission consists of four or more members, in which case three members will form a quorum ;

[1] The concession of the power to the Imperial Government is doubtless due to the pledges under which that Government is to protect the interests of the natives in Basutoland and the Protectorates. The legislative power of the Governor-General in Council appears to be meant to be exclusive of Parliament ; see Lord Crewe in *House of Lords Debates*, ii. 764, 765. But contrast *House of Commons*, ix. 1636–8, and the curious use of ' Bill ' in the schedule, s. 25, where reference is made to the reservation of all Bills altering the provisions of the schedule, unless it merely means draft proclamation. See p. 1074.

the Prime Minister or other Minister of State as his deputy, or failing him the Vice-Chairman, shall preside and shall have a casting vote in case of equality. The Commission shall advise the Prime Minister upon all matters relating to the administration of or the legislation for the territories. Any member who dissents from a decision of the majority may have the reasons for his dissent recorded in the minutes. The members shall have access to all official papers regarding the territories and may deliberate on any matter relating thereto, and advise the Prime Minister thereon. Before coming to a decision on any matter relating to the administration other than routine or of legislation for the territories, the Prime Minister must deposit the papers with the Secretary of the Commission, and a meeting of the Commission must be convened to discuss the matter. If the dispatch of some communication appears to be urgent, the Prime Minister may sanction it without submitting it to a meeting of the Commission, but he must record his reasons and give notice thereof to every member. If in any case the Prime Minister does not accept their recommendations or proposes to act contrary to their advice, he must state his views to the Commission, who will be at liberty to place on record the reasons for their recommendation or advice. The record shall then be laid by the Prime Minister before the Governor-General in Council, whose decision shall be final.[1] The Commission, however, are entitled to demand that the record of their dissent from the decision or action taken, and the reasons therefor, shall be laid before both Houses of Parliament, unless in any case the Governor-General in Council expresses in a formal minute the opinion that the publication of such record and reasons would be gravely detrimental to the public interests.

[1] This appeal is from Caesar to Caesar, and merely allows the possibility of intervention by the Governor-General on Imperial grounds, an intervention hardly ever likely to be actually interposed, as *ex hypothesi*, when the control of the Protectorates is surrendered it will be surrendered for good, in reliance on the discretion of the Union Government.

These provisions therefore make the final authority of administration the Executive Government of the Union, and it seems impossible to deny that the Executive Government must inevitably in the long run be responsible for native policy, and any attempt to deprive it of such responsibility would be fatal to the efficient working of the Union. At the same time, it is obviously necessary—and the fact was accepted both by the South Africa Native Affairs Commission [1] and the Natal Native Affairs Commission [2]—that permanency in native policy should be attained, and this could hardly be secured in the change of political governments. The element of continuity is secured by the appointment of this permanent Commission, which must naturally attain great influence by its knowledge and by its right of being consulted, and it may be hoped that the new experiment, when actually tried, will be more successful than any previous experiments in South Africa have been.

Hitherto attempts have been made in Natal, the Transvaal,[3] and the Orange River Colony [4] to give the Governor an independent position with regard to native matters, while the Imperial Government has retained the sole control of the Protectorates and Basutoland. It is clear that for the full development of South Africa the Protectorates and Basutoland must ultimately fall to the Union Government, and it is equally clear that fitful efforts to preserve the independent control by the Governor of native affairs cannot ultimately produce any good results.

As we have seen, the Aborigines Protection Board of Western Australia, which at one time it was proposed to keep independent of the Colonial Government, was abolished in 1897, after it had worked unsatisfactorily and with much friction for seven years, and it was not proposed to make any similar attempt in South Africa, since in the case of

[1] Cf. *Parl. Pap.*, Cd. 2399, p. 31.

[2] Ibid., Cd. 3889, p. 15. The Commission here recommended a Council to advise the Governor, and one was set up by Act No. 1 of 1909.

[3] Letters Patent, December 6, 1906, s. 51.

[4] Letters Patent, June 5, 1907, s. 52. The powers conferred are very vague.

Natal the independent position of the Governor has not produced any obviously satisfactory results.

The actual detailed administration of the Protectorates will be carried on as before by Resident Commissioners, who will be required in addition to their other duties to prepare annual estimates of revenue and expenditure and forward them to the Prime Minister, when they will be submitted to the Commission and approved of or amended by the Prime Minister, and thereupon become binding upon the Resident Commissioner by being enacted by a proclamation by the Governor-General in Council.

There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported into and consumed within the territories, and there shall be paid out of the Treasury annually towards the cost of administration in each territory a sum in respect of the duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average of the customs revenue for the three complete financial years last preceding the taking effect of the Act bore to the average of the whole customs revenue for all the Colonies and Territories included in the Union received during the same period. In case the revenue for any territory for any financial year shall be insufficient to meet the expenditure, the deficiency shall be advanced from the funds of any other territory. If this cannot be arranged, the deficiency shall be advanced by the Union Government. In case there shall be a surplus for any territory, such surplus shall in the first instance be devoted to repayment of any sums previously advanced by any territory or the Union Government to cover any deficiency in such territory, and thereafter it shall be lawful for the Governor-General in Council to lend the whole or any part of such surplus to any other territory. Subject to these provisions, the revenues derived from any territory shall be expended for and on behalf of the territory in question, provided that the Governor-General in Council may make a special appropriation for defence or other general purposes of the Union, provided that the contribution shall not bear a higher proportion to the total cost of the

services than that which the amount payable from the treasury of the Union towards the cost of administration of the territory bears to the total customs revenue of the Union on the average of the three immediately preceding years.[1]

Further provisions are made for the security of native rights in the territories.[2] It shall not be lawful to alienate any land in Basutoland or any land forming part of the native reserves of the Bechuanaland Protectorate and Swaziland from the native tribes inhabiting the territories.

The sale of liquor to natives is to be prohibited in the territories, the rules respecting the liquor trade are to be maintained, and the Basuto custom of holding pitsos or other recognized forms of native customs shall be maintained.[3] No differential duties or imposts on the produce of the territories shall be levied, and the laws of the Union relating to customs and excise shall be made to apply to the territories.

There shall be free intercourse for the black and white inhabitants of the territories with the rest of South Africa, subject to the laws, including the Pass Laws of the Union, a qualification of considerable importance.[4]

In place of any appeal which now lies to the King in Council from any Court of the territories, the appeals are to be made to the appellate division of the Supreme Court of South Africa.

The rights of civil servants employed in the territories as existing on the date of transfer are to remain in force, while the members of the Commission shall be entitled to such pensions as the Governor-General in Council shall provide, and the salaries and pensions of the members and of other

[1] Cf. *The Government of South Africa*, ii. 262 seq., for the financial position in 1908.

[2] The provisions follow the analogy of the Transvaal and Orange River Colony Letters Patent of December 6, 1906, and June 5, 1907, which provide for the Governors exercising the powers of Supreme Chiefs, for the non-alienation of land save by law (a much less stringent rule than now laid down), and for councils of chiefs. Cf. also s. 147 of the Act.

[3] Cf. *The Government of South Africa*, i. 138, and see now High Commissioner's proclamation, No. 7 of 1910, placing the whole matter on a secure basis. Proclamation No. 1 deals with liquor.

[4] Cf. ibid., pp. 115, 116, 135.

expenses of the Commission shall be borne by the respective territories in proportion to their respective revenues.

The Governor-General in Council shall annually prepare a report on the territories, which is to be laid before both Houses of Parliament.[1]

These provisions, which represent the principle on which the administration of the territories is at present carried out, can be altered by an Act of the Union Parliament, but any Bill affecting the provisions of the schedule must be reserved for the signification of His Majesty's pleasure, and cannot therefore come into force without the approval of His Majesty's Government. At least this seems to be the force of s. 25 of the Schedule.

The protection thus assured for the natives of the territories on their becoming part of the Union appears as complete as it can be made by law, and should go far to obviate any fears which may exist as to any loss of native rights on the Protectorates becoming part of the South African Union. The Basuto chiefs appear to have accepted as adequate the assurances given as to their future in the Union, and in any case the transfer cannot, it is obvious, be carried out at any very early date, as no alteration in existing conditions could conveniently be made pending the coming into full operation of the Union Government.

At the same time, the surrender of control over the Protectorates will necessitate the definitive assumption by the Union Government of responsibility for military control, so that the Imperial garrison may be reduced to a mere guard for the naval establishment at the Cape, or be totally withdrawn.[2] If Imperial troops are to be potentially available for maintaining order among the natives as at present—for they would and must be used in any case of disaster to the Colonial militia—the Imperial Government cannot, of course, renounce control, as it remains responsible to the Imperial Parliament.

[1] This is in imitation of the present reports issued by the Colonial Office. Similarly reports on Papua and on the Indians are presented to the Australian and Canadian Parliaments every year respectively.

[2] Cf. Mr. Molteno in *House of Commons Debates*, ix. 986.

CHAPTER IV

THE IMMIGRATION OF COLOURED RACES

§ 1. Chinese Immigration

No question at present exceeds in difficulty the question of the relations of the Imperial Government and the Dominion Governments with regard to the immigration of coloured persons in the Dominions and their treatment while there. Happily in some ways there are traces of settled policy being evolved from which good may flow, but the situation is still fraught with serious possibilities of conflict.

The case of the Chinese stands by itself and can well be treated separately. The Chinese have no treaty right whatever to set foot on any British possession, for the Treaty of Nankin in 1842 and the Treaty of Pekin in 1860 are unilateral, and do not secure any freedom of migration to the Chinese.[1] The discovery of gold in Australia led in 1854 to a Chinese influx, which was met by a series of Acts in Victoria (beginning with a law (No. 39) in 1855 forbidding more than one Chinaman to be brought in for each ten tons of the vessel bringing him), the chief among which—a poll-tax—diminished the numbers of Chinese from 42,000 in 1859 (in 1854 there were only 2,000) to 20,000 in 1863. The laws were repealed in 1865 (No. 259). South Australia legislated in 1857 (No. 3), but repealed the Act in 1861 (No. 14); New South Wales in 1861 (No. 3), but repealed the Act in 1867 (No. 8); Queensland, after a Bill in 1876, which was reserved by Governor Cairns, and, despite the protests of the Government against reservation merely because of its unusual character and importance, did not receive the royal assent, in 1878 (No. 8) provided that Asiatic and African aliens could not mine on the goldfields until three years after their first proclamation as goldfields, while in 1877 (No. 8) it regulated immigration by imposing a £10 head tax,

[1] See *Parl. Pap.*, C. 5374; contra, C. 5448, p. 57.

to be refunded if the immigrant left in three years. The usual form of these Acts was to require a payment of £10 a head on Chinese immigrants, and to restrict the number carried on any ship to one man per ten tons.[1]

In 1878 the first anti-Chinese movement began in British Columbia, when the Legislature passed an Act (c. 35) to impose licence dues of $10 payable quarterly on the Chinese in lieu of taxes paid by other members of the community, an Act which was afterwards held by the Courts to be invalid.[2] In 1884 three Acts (cc. 2–4) were passed, one of which, to prevent immigration of Chinese, was disallowed by the Dominion Government as possibly of Imperial interest,[3] and as in any case a matter rather for Dominion legislation than for provincial action; while the other two, one to prevent them obtaining Crown lands, and the other to regulate their habits, were allowed to remain in operation. But the Dominion Government found it necessary to act, and accordingly an Act of 1885[4] imposed a poll-tax of fifty dollars a head, and restricted the number of Chinese to be carried to one for every fifty tons. The Dominion Government, however, disallowed the Act (c. 13) passed in 1885 to repeat the terms of the disallowed Act of 1884 regarding immigration.

The same period saw the revival of Australian legislation; Acts were passed again in 1881 by New South Wales (No. 11), Victoria (No. 723), and South Australia (No. 213), and New Zealand entered the field for the first time with anti-Asiatic

[1] See *Parl. Pap.*, C. 5448. All the Acts are printed or summarized in the appendix.

[2] *Tai Sing* v. *Maguire*, 1 B. C. (Irving), at p. 109. The decision was a curious one, based on views as to taxation which were incorrect, and as to the exclusive powers of the Dominion as to trade and commerce which were doubtful; cf. Lefroy, *Legislative Power in Canada*, pp. 254–9; *Provincial Legislation*, 1867–95, pp. 1011, 1052, 1063.

[3] But see Lord Derby's reply, May 31, 1884, and British Columbia *Sess. Pap.*, 1885, p. 464. The latter Act was held invalid in *R.* v. *Wing Chong*, 1 B. C. (part ii) 150, and though leave to appeal was granted it was not prosecuted. See above, p. 698.

[4] 48 & 49 Vict. c. 7; *Sess. Pap.*, 1883, No. 93. See now *Revised Statutes*, 1906, c. 95.

legislation (No. 47). The Acts were on the same lines as those of the sixties, imposing a poll-tax on arrival of £10, and limiting the number by the tonnage, in New Zealand and South Australia the limit being one to ten tons, in New South Wales and Victoria one to every hundred tons, while South Australia alone exempted British Chinese subjects from the operation of the rule. Western Australia, however, in 1884 (No. 25) contemplated indentured immigration of Chinese and other Asiatics, and not until 1886 did it pass its first anti-Chinese Act (No. 13), which adopted the poll-tax of £10 a head, but made the proportion one to fifty tons. On the other hand, an Act of 1886 excluded Asiatic or African aliens from holding miners' rights on a goldfield for five years after proclamation, a provision aimed at the Chinese. In 1884 (No. 13) Queensland raised the tax to £30 a head, which was no longer repayable on departure within three years without having become a public charge or been convicted of crime, and the proportion to one to fifty tons, while Tasmania passed its first anti-Chinese Act (No. 9) in 1887, the proportion being one to a hundred tons and the tax £10. Victoria also began to discriminate against Chinese by factory legislation in 1887 (No. 961).

In 1888, however, the whole matter took on a grave aspect. The Chinese Minister had made representations in 1887,[1] and the Secretary of State had addressed a dispatch to the Governors on this topic. Then the Chinese had commenced to pour into the vacant Northern Territory of South Australia so that a panic started in the Colonies: South Australia imposed a tax of £10 a head on Chinese immigrants into the Northern Territory, and Victoria and New South Wales refused Chinese permission to land, an action which ultimately was held to be legal in the case of *Musgrove* v. *Chun Teeong Toy*[1] by the Judicial Committee of the Privy Council, on the ground that an alien had no power to sue on account of non-admittance into a British Colony. Then New South Wales

[1] *Parl. Pap.*, C. 5448, pp. 1, 2; cf. pp. 56–8.

[2] [1891] A. C. 272. Cf. 14 V. L. R. 349, which it overruled, and see Haycraft, *Law Quarterly Review*, 1894, pp. 165 seq.; 14 C. T. R. 24; 20 C. T. R. 684.

legislated and imposed a poll-tax of £100, and allowed only one Chinese to three hundred tons, and, while the Bill was still *in posse*, there was held a conference of all the states in Sydney in June 1888.[1] It was agreed then to adopt the principle of no poll-tax and one Chinese to every five hundred tons,[2] and to penalize transit across the Colonial borders. The New South Wales Government promised to amend their Act if two other Colonies adopted the legislation approved by the Conference, and on this understanding the Bill was allowed to become law. The result was that Victoria and South Australia legislated in 1888 on the lines of the agreement ; Western Australia followed suit in 1889 ; Queensland legislated in 1888, going beyond the lines of the Conference by increasing the penalties and diminishing the exemptions ; this Bill was only allowed in 1889 (No. 22), after having been reserved, on a promise of amendment, and an amending Bill was passed in 1890 (No. 29), reserved, and assented to, but further amendments were vainly asked for by the Secretary of State. New Zealand in 1888 passed an Act (No. 34) which increased the restrictions and the penalties.

In 1893 Western Australia, now a self-governing Colony, threw in its lot with the others and prohibited the importation of Chinese under the labour law of 1884, but this was modified in 1897 (No. 27) by permitting such importation of indentured labour north of the 27° south latitude, and restricting the number to one for five hundred tons. New Zealand passed in 1896 another Act (No. 19) against Chinese, which limited the number imported to one for two hundred tons and increased the poll-tax to £100. In 1907 an Act (No. 79) was passed requiring any Chinese immigrant to be able to read a printed passage of not less than a hundred words of English,

[1] *Parl. Pap.*, C. 5448, pp. 35 seq. Cf. also Dilke, *Problems of Greater Britain*, i. 146, 147 ; Parkes, *Fifty Years of Australian History*, ii. 204–31.

[2] The Imperial Government was to ask the Chinese Government to arrange for restriction of the entry of Chinese, and a joint representation for this end was agreed on. The Chinese exclusion movement in America had just then come to its height, and influenced the Colonies in their views of action ; a treaty of March 1888 had agreed to restriction, but failed to become law.

and though this Act has been amended in detail in 1908 (No. 230) and 1910 (No. 16) to lessen hardship, it still is in practical effect. An appeal from the Chinese of the Dominion met with a courteous reply from the Secretary of State, but also with a definite refusal to interfere in the legislation of the Dominion, as it was a matter for their decision.[1] The number of Chinese in the Colony is steadily diminishing, and a *Factories Act* (No. 67) of 1910 is intended to prevent them monopolizing the laundry business, but it does not in terms attack Asiatics or Chinese.

In Canada in 1900 (c. 32) the poll-tax was made a hundred dollars, but the number of Chinese increased, and a Royal Commission was appointed to inquire into the situation ; in 1902 they sent in a most valuable and able report, and recommended that the poll-tax should be raised to $500, and this was done in 1903 (c. 8), a protest from the Chinese being overruled, and the situation has since remained unchanged, except that certain concessions were made in 1908 (c. 14) in regard to bona-fide students and others.[2] On the other hand, an Act of 1911 restricts the entry of merchants by insisting on proof of bona fides. The number who pay this tax is quite considerable, and Canada is prepared to negotiate with China an arrangement similar to that in force with Japan for a check at the other end.

In South Africa the famous experiment of Chinese labour in the Transvaal,[3] initiated under Crown Colony Government, and merely continued under responsible government, evoked an anti-Chinese Act from the Cape in 1904,[4] which prevented further Chinese immigration altogether except in the case of British subjects, and Newfoundland passed a similar Act in

[1] New Zealand *Parl. Pap.*, 1908, A. 1, pp. 15, 19; 1909, A. 2, p. 7; *Parliamentary Debates*, 1907, cxlii. 838 seq., 923 seq., 961 seq.

[2] See *Sess. Pap.*, 1902, No. 54. In *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A. C. 580, a provincial Act forbidding the employment of Chinese underground was held to be *ultra vires*, as being in fact an Act to prevent Chinese living in British Columbia. See above, p. 698.

[3] See *Parl. Pap.*, Cd. 1895, 1898, 1899, 1941, 1945, 1986, 2025, 2026, 2105, 2183 (1904); 2401 (1905); 2786, 2788, 2819, 3025; H. C. 114, 156 (1906); 3328, 3045 (1907); 3994 (1908).

[4] No. 37; No. 15 of 1906.

1906 (c. 2), amended in 1907 (c. 14), which was merely, it seems, a demonstration of sympathy with the Cape protest against Chinese labour, as Chinese do not resort in large numbers to the Colony.

§ 2. British Indian and Japanese Immigration

Much more serious issues have arisen from the treatment of British Indians on the one hand and Japanese on the other. The former naturally claim freedom of locomotion as part of the advantages of Empire; the latter are, as subjects of a first-class power, and since 1905 in close alliance with Great Britain, determined upon treatment consistent with their just rights and dignities. On the other hand, it is not merely in the interest of the Dominions, but of the Empire, to keep the Dominions pure and free from race mixture, which would hardly be likely to improve their prospects of development as great free communities.[1]

In 1896 the whole question came forward in an urgent manner in Australia. In this year, as a result of a Premiers' Conference in March at Sydney, Western Australia alone being unrepresented, it was agreed to extend the anti-Chinese measures to other Asiatics, and New South Wales, South Australia, Tasmania, and New Zealand all presented Bills to effect this end; Tasmania exempted British subjects, and New Zealand British Indians from the provisions of the Bills. The Bills were reserved, and the matter was discussed at the Colonial Conference of 1897, when Mr. Chamberlain, in welcoming the delegates, laid down the following principles :— [2]

One other question I have to mention, and only one, that is, I wish to direct your attention to certain legislation which is in process of consideration, or which has been passed by some of the Colonies, in regard to the immigration of aliens, and particularly of Asiatics.

I have seen these Bills, and they differ in some respects

[1] Cf. Reeves, *State Experiments in Australia and New Zealand*, ii. 325–64. See also Commonwealth *Parliamentary Debates*, 1901–2, pp. 3497 seq.; *Parl. Pap.*, 1901–2, Nos. 2, 33, A. 15, 18; Quick and Garran, *Constitution of Commonwealth*, pp. 623 seq.; South Australia *Parl. Pap.*, 1896, No. 38.

[2] *Parl. Pap.*, C. 8596, p. 12.

one from the other, but there is no one of them, except perhaps the Bill which comes to us from Natal, to which we can look with satisfaction. I wish to say that Her Majesty's Government thoroughly appreciate the object and the needs of the Colonies in dealing with this matter. We quite sympathize with the determination of the white inhabitants of these Colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics, that there shall not be an influx of people alien in civilization, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interests of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object, but we ask you also to bear in mind the traditions of the Empire, which makes no distinction in favour of, or against, race or colour; and to exclude, by reason of their colour, or by reason of their race, all Her Majesty's Indian subjects, or even all Asiatics, would be an act so offensive to those peoples that it would be most painful, I am quite certain, to Her Majesty to have to sanction it. Consider what has been brought to your notice during your visit to this country. The United Kingdom owns, as its brightest and greatest dependency, that enormous Empire of India, with 300,000,000 of subjects, who are as loyal to the Crown as you are yourselves, and among them there are hundreds and thousands of men who are every whit as civilized as we are ourselves, who are, if that is anything, better born in the sense that they have older traditions and older families, who are men of wealth, men of cultivation, men of distinguished valour, men who have brought whole armies and placed them at the service of the Queen, and have in times of great difficulty and trouble, such for instance as on the occasion of the Indian Mutiny, saved the Empire by their loyalty. I say, you, who have seen all this, cannot be willing to put upon those men a slight, which I think is absolutely unnecessary for your purpose, and which would be calculated to provoke ill-feeling, discontent, irritation, and would be most unpalatable to the feelings not only of Her Majesty the Queen but of all her people.

What I venture to think you have to deal with is the character of the immigration. It is not because a man is of a different colour from ourselves that he is necessarily an undesirable immigrant, but it is because he is dirty or

immoral, or he is a pauper, or he has some other objection which can be defined in an Act of Parliament, and by which the exclusion can be managed with regard to all those whom you really desire to exclude.

He then reiterated his approval of the Natal principle, and invited the adoption of a settlement which would spare the feelings of the Indian subjects of the Queen while protecting the Colonies from any invasion of the class to whom they would justly object.

The Conference ended without a definite settlement, but the report expressed confidence that a solution on the lines indicated was possible.

The Natal Act No. 1 of 1897 referred to in the speech by Mr. Chamberlain embodied the principle of a test of writing in a European language an application for admission in a prescribed form, as well as excluding paupers, idiots, diseased persons, criminals, and prostitutes, and it was held up to approval also as regards the question of Japanese susceptibilities in a dispatch of October 20, 1897, from Mr. Chamberlain to the Australian Colonies, which was published in Australia.[1] In it he said that M. Kato, the Japanese Minister, would be satisfied by the exclusion of Japanese by a language test, and the same principle might well be adopted with regard to Indians. Western Australia legislated in 1897 (No. 13) on these lines. New South Wales proceeded to adopt this principle in 1898 (No. 3), the Bill being restricted to the writing test by the Legislative Council, and Tasmania did so in 1898 (No. 69), while New Zealand adopted a similar Act (No. 33) in the next year. In Victoria the two Houses disagreed, and nothing was done. But in 1900, according to a return given to the House of Commons,[2] no restrictions had been adopted in South Australia, in Victoria, or in Western Australia, except that a special Act of 1897 provided for the introduction of indentured labour, and in Queensland there were certain minor restrictions.[3] On the coming into

[1] Commonwealth *Parl. Pap.*, 1901, No. 41.

[2] *Parl. Pap.*, H. C. 393, Sess. 2, 1900.

[3] The franchise was not given for the Assembly except for a freehold

existence of the Commonwealth, a general *Immigration Act* was passed in 1901, which provided for a language test, and this, amended since in many particulars, last in 1910[1]—so as to prevent the smuggling in of Asiatics, especially Chinese—is still in force, though it is rarely applied, for the mere existence of the test keeps out all coolies, and an informal arrangement with India[2] in 1904 allows free entry to merchants, students, and similar people who do not desire to settle in the country for good ; indeed, as regards them the policy of Australia is generous and satisfactory to every one. The character of the test when set may be illustrated by a passage set, it seems, in 1908[3] to a Chinese immigrant :—

> Very many considerations lead to the conclusion that life began on the sea first as single cells, then as groups of cells held together by a secretion of mucilage, then as filaments and tissues. For a very long time low-grade marine organisms are simply hollow cylinders through which salt water streams.

The effect of the Commonwealth *Immigration Act* has received full consideration in several cases from the High Court ; it has been held that it only applies to a true immigrant, though immigration covers entry for a non-permanent residence ; that therefore a Chinese boy—it is not clear whether legitimate or not—who was taken to China at age 5 by his father, cannot be deemed an immigrant on his return after twenty-eight years as a man to Australia. On the other hand, it has been held that the artificial law of domicile does not afford ground for a Chinese born out of Australia to claim to return because his father was there domiciled.[4]

In other matters, however, the Asiatic question has still

qualification ; by an Act of 1905 the freehold qualification disappeared. See also 51 Vict. No. 11, s. 7 ; 56 Vict. No. 11, s. 43 ; 61 Vict. No. 25, s. 85 ; 62 Vict. No. 24.

[1] See No. 17 of 1905 ; No. 25 of 1908 ; No. 10 of 1910.

[2] Commonwealth *Parl. Pap.*, 1905, No. 61.

[3] *West Australian*, May 1, 1908.

[4] *Chia Gee* v. *Martin*, (1905) 3 C. L. R. 649 ; *Lindberg* v. *Ah Sheung*, (1906) 4 C. L. R. 649 ; *Ah Yin* v. *Christie*, (1907) 4 C. L. R. 1427.

caused trouble. Queensland joined the Japanese commercial Treaty of 1894 under a special protocol permitting the Queensland Government to interfere with Japanese immigration of the labouring classes;[1] this arrangement became binding in 1901 on the Federal Government and Parliament, but in 1908 the Imperial Government at the request of that Government gave notice of the denunciation of the agreement under the power to do so reserved therein. With the Commonwealth Government trouble also arose because of the passing of the Commonwealth *Post and Telegraph Act* No. 12 of 1901, which forbade any contract with regard to the carriage of mails being entered into which applied to ships not manned by white labour.[2] This terminated the joint arrangements between the Imperial Government and the postal authorities of Australia for the carriage of mails, and the action of the Commonwealth was criticized as follows by the Secretary of State in a dispatch of April 17, 1903 :— [3]

His Majesty's Government much regret that the legislation which has recently been passed in Australia has made it impossible for them to be associated in future with the Government of the Commonwealth in any mail contract. They recognize the importance to the cause of Imperial unity of joint action in such matters as postal communication between the Mother Country and the great self-governing Colonies, and they would not on slight grounds withdraw from such co-operation; but the legislation in question, affecting as it does principally Indian subjects of His Majesty, leaves no other course open to them. By the Mutiny Proclamation of 1858 the Crown declared itself bound to the natives of its Indian territories by the same obligations of duty which binds it to all its other subjects, and undertook faithfully and conscientiously to fulfil those obligations. It would not be consistent with that undertaking for His Majesty's Government to become parties to a contract in which the employment of His Majesty's Indian subjects is

[1] See Queensland *Parl. Pap.*, 1899, A. 5.

[2] Cf. the *Postal Act* of the Union of South Africa No. 10 of 1911, which forbids the grant of such a contract to any steamship belonging to a company which engages in a 'combine'.

[3] *Parl. Pap.*, Cd. 1639, pp. 4, 5; Commonwealth *Parl. Pap.*, 1903, Nos. 21 and 40. Cf. 1901–2, A. 23.

in terms forbidden, on the ground of colour only. His Majesty's Government have shown every sympathy with the efforts of the people of Australia to deal with the problem of immigration, but they have always objected, both as regards aliens and as regards British subjects, to specific legislative discrimination in favour of, or against, race and colour, and that objection applies with even greater force to the present case, in which the question is not of the rights of the white population of Australia as against an influx of foreign immigrants, but merely of the employment of His Majesty's Indian subjects on a contract to be mainly performed in tropical or sub-tropical waters.

Even if the service were one upon which His Majesty's Indian subjects had not hitherto been employed, it would destroy the faith of the people of India in the sanctity of the obligations undertaken towards them by the Crown if the Imperial Government should become in any degree whatever parties to a policy of excluding them from it solely on the ground of colour. But where they have already been employed in the service for a long period of years, to proscribe them from it now would be to produce justifiable discontent among a large portion of His Majesty's subjects. His Majesty's Government deeply regret that their feeling of obligation in this matter is not shared by the Parliament of the Commonwealth, and that in regard to a matter which cannot affect the conditions of employment in Australia, and in no way affects that purity of race which the people of Australia justly value, they should have considered it desirable to dissociate themselves so completely from the obligations and policy of the Empire.

Similarly in 1906 the reserved Bill of the Commonwealth Parliament restricted the preference to British goods to such as were imported in British ships manned exclusively by white labour. But the Bill never received the royal assent because it infringed in its restrictions to British ships the principle of several treaties of commerce, and thus the question of white labour did not require decision.[1] But the temporary visits of merchants, students, and distinguished

[1] Cf. Harrison Moore, *Commonwealth of Australia*,[2] p. 110, n.; Commonwealth *Parl. Pap.*, 1907, No. 3; *Debates*, 1906, pp. 3709-13, 3760-91, 3866-965, 5051-7, 5288-346, 6140-75, 6370-9, 6393-402, 6408 seq. The Austro-Hungarian Treaty, and probably the Russian Treaty, would have run counter to this provision. But see also *Parl. Pap.*, Cd. 3523, p. 315.

strangers to the Commonwealth have been facilitated by an informal arrangement with India and Japan made in 1904.[1]

A reserved Bill (No. 85) of 1910 of New Zealand raises very serious questions. It provides that in the case of vessels trading or plying from the Dominion to the Commonwealth a duty of twenty-five per cent. of the passage money and freight shall be levied on contracts in respect of passengers and goods conveyed by ships which have natives of Asia among the crew, unless indeed such ships pay the New Zealand rate of wages to their crews. The latter provision could not legally be enforced directly, as it would be *ultra vires* the New Zealand Parliament, but the former provision is not *ultra vires*, but is directly anti-Asiatic, and avowedly aimed at Asiatics, as stated in the *Parliamentary Debates*, and at the discussion at the Imperial Conference.[2]

With the State Governments since federation the trouble has been the insertion in Acts of small differentiations against Asiatics *eo nomine*. In some cases the Imperial Government has succeeded in having changes made in such Acts. In 1900 Queensland passed a Bill to amend the *Sugar Works Guarantee Acts*, 1893–5, which contained an anti-Asiatic section, and which the Imperial Government declined to assent to, on a protest from Japan. Queensland in 1905 (No. 15) extended to all aliens a discrimination in an Act (No. 13) of the preceding year against Asiatics in the matter of the granting of agricultural advances, and in other legislation in 1904 (No. 18) and 1910 (No. 9) has adopted the language test as a ground of regulation. In 1908 the Upper House of Victoria cut out clauses against Asiatics in a Factory Act as unjust and improper; in 1909, by a free use of the name of the Imperial Government, the Government of New South Wales secured the restriction to Chinese of certain provisions in an Act regarding factories; in 1907 the Government of New Zealand made changes in a Factory Act in order to avoid reservation under the instructions to the Governor; but on the other hand, Western Australia has passed several

[1] Commonwealth *Parl. Pap.*, 1905, No. 61.

[2] Cf. *Parl. Pap.*, Cd. 5745, pp. 395 seq.; below, pp. 1211–5.

minor Acts, including a *Factories Act*, No. 22 of 1904, discriminating against Asiatics, and a proposal to amend only resulted in a very violent attack in the Lower House in 1905 on the Imperial Government;[1] while South Australia has still on the statute book several anti-Asiatic provisions, dating from 1901–6,[2] and in its *Aborigines Act* of 1910 (No. 1024) it forbids Asiatics having aborigines in their employment. But it is fair to say that, except as regards the Chinese, who remain a race apart, the feeling is now growing in Australia that the Asiatics in the country are entitled to full citizenship as far as possible, though the anti-Asiatic feeling is seen in the Act No. 26 of 1910, which forbids the emigration from Australia of children to Asiatic countries save under safeguard; so the *Old Age Pensions Act*, No. 17 of 1908, of the Commonwealth, which excludes Asiatics and Africans generally, expressly gave pensions to Australian Asiatics, though Asiatics with Africans and Polynesians are excluded from the Commonwealth franchise under Act No. 8 of 1902, unless they are entitled to vote, as being voters for the Lower Houses in the states, and in only two states are Asiatics born there under any disabilities as to voting, viz· Queensland, where an Act of 1905, No. 1, and Western Australia, where an Act, No. 27 of 1907, have deprived the Asiatics of any vote at all in the Lower House elections, the restriction hitherto having been merely in respect of the franchise on other than a freehold qualification. South Australia used to forbid Asiatic immigrants voting in the Northern Territories, but not persons born there.

§ 3. British Indians and Japanese in Canada

In Canada there has been serious trouble both as regards Indians and Japanese. British Columbia, as usual, is the cause of the disturbance of peace. In 1897 an anti-Japanese

[1] *Parliamentary Debates*, xxvii. 98 seq. So also *Mining Act*, 1904, and *Early Closing Act Amendment Act*, 1904. But in 1909 a Fisheries Bill which penalized Asiatics was not carried in the Upper House, and in 1910 a Marriage Bill forbidding marriages with Asiatics in certain cases was not proceeded with.

[2] Act No. 763, s. 3; 839, ss. 19, 21, 50; 890, s. 5.

Bill was reserved and never became law. In 1898 that Legislature inserted in a number of private Acts a clause imposing a fine of four dollars a day for each Japanese or Chinese person employed, and also passed a *Labour Regulation Act* (c. 28) and a *Tramway Incorporation Act* (c. 44) for the purpose of Japanese exclusion. The Japanese Government protested, and the Imperial Government addressed the Canadian Government on the subject, with the result that the British Columbian Government asserted that it was essential to preserve the province for white immigrants, and asked that the Acts be allowed to stand.[1] But the Imperial Government pressed not that the Japanese should be allowed to immigrate but that they should not be treated *nominatim*, and thus stigmatized as undesirable, and the two public Acts were disallowed accordingly by the Dominion Government. In 1899 the Legislature passed a *Liquor Licences Act* (c. 39), and a *Coal Mines Regulation Act* (c. 46), both of which discriminated against Japanese, and the first also against Indians ; both were disallowed. In 1900 it passed a Natal Act (c. 11) and a *Labour Regulation Act* (c. 14) embodying the language test, both of which were disallowed, a *Liquor Licences Act* (c. 18) which differentiated against Mongols and Indians, and a *Vancouver Incorporation Act* (c. 54), which denied the same people the franchise. These two Acts were, as the differentiation was very slight in either case, allowed to remain in operation. In 1902 (cc. 34, 38, 48) and 1903 (cc. 12, 14, 17) Immigration and Labour Regulation and Coal Mine Regulation Acts were disallowed. The Royal Commission of 1902 reported against restrictions on Japanese, because Japan had since August 1, 1900, restricted immigration to British Columbia. If a change of policy took place, they recommended the passing of an Act on the Natal model. In 1904 an *Immigration Act* was disallowed (c. 26), and the same trio as in 1902 and 1903 were disallowed (cc. 28, 30, 36) in 1905.

In January 1906 the Government of Canada acceded to the Japanese Treaty under a special protocol accepting

[1] Canada *Sess. Pap.*, 1900, No. 87 ; *Provincial Legislation*, 1896–8, p. 77 ; 1899–1900, pp. 104, 124 seq. ; 1901–3, pp. 80, 88 ; 1904–6, pp. 130, 137, 150.

unreservedly the free right of immigration given, though the danger was pointed out by the Imperial Government.[1] Things went smoothly until 1907, when the influx of Japanese due to inducements held out by steamship companies and to an exodus from Hawaii through the rivalry of Portuguese labour, lead to a riot in Vancouver in September, in which a good deal of damage to property was done, which the Dominion Government at once made good. But Mr. Lemieux was sent to Japan, and with the Ambassador's aid negotiated a treaty for a more restricted immigration from Japan, and since then, January 1908, there has been no fresh trouble.[2] Canada has decided not to adhere to the new treaty of 1911 with Japan, but the two countries have agreed to give each other for two years, pending a special negotiation, most favoured nation treatment; the arrangement as to immigration being unaffected. In 1908 the British Columbia *Immigration Act* (c. 23) was questioned in the Courts before it could be disallowed and pronounced void alike as regards Japanese and British Indians; in 1907 the Lieutenant-Governor had declined to assent to the Bill.

In the case of British Indians the riot was due to the influx of such Indians from Hong Kong. It was found necessary to use the powers of the Government under the Immigration Acts of 1906 and 1908 to impose a property qualification of twenty-five and later two hundred dollars, and to insist on the possession of through tickets from India, a plan which has reduced the immigration to reasonable limits.[3] But protests have been made against the prohibition by which Indians are denied the franchise in British Columbia.[4]

[1] See the summary in *Canadian Annual Review*, 1907, pp. 382–98; Act 6 & 7 Edw. VII, c. 50; in *re Nakane and Okazake*, 13 B. C. 370; in *re Behari Lal et al.*, ibid., 415.

[2] See *House of Commons Debates*, 1907–8, pp. 694–753, 2025–159.

[3] Mr. Mackenzie King negotiated with the Indian Government and the Imperial Government on the matter in 1908, and reported on his mission to the Dominion Parliament; *Parl. Pap.*, Cd. 4118. See Act 9 & 10 Edw. VII. c. 27, ss. 37, 38.

[4] Upheld by the Privy Council in *Cunningham* v. *Tomey Homma*, [1903] A. C. 157, in the case of a Japanese. Cf. *Parl. Pap.*, Cd. 5745, pp. 407, 408; 5746–1, pp. 279–81.

§ 4. The Asiatic Question in South Africa

In 1902 the Cape at last followed the model of Natal in 1897 and passed an Act (No. 47) imposing a dictation test in a European language, to which Yiddish was added in Act No. 30 of 1906, an addition which was the cause of some sarcasms at the expense of the magnates.[1] Natal renewed and altered in detail the *Immigration Restriction Act* of 1897 in 1903 (No. 30) and 1906 (No. 3), but of late her chief achievement has been a series of disputes regarding the legislation affecting British Indians. An Act, No. 18 of 1897, regarding licences, required that the licences should be possessed only by merchants who could keep accounts in English, and latterly this was extended by interpretation to mean that they must be able to keep their accounts personally in that language. In 1909, however, this Act was amended (No. 22) to allow of an appeal to the Supreme Court from the refusal of a town body to renew a licence, as it was justly urged that the town authorities were hardly impartial judges of their rivals in business. A Municipal Corporations Bill of 1905 excluded from the municipal franchise all persons who were excluded by an Act No. 8 of 1896 from the Parliamentary franchise, and this included Indians ; moreover, its language as regards Indians was deemed discourteous as classing them with barbarous races, and it was refused assent unless amended. In 1908 proposals were also mooted for the cessation of the grant of dealers' licences to Indians, and the prevention of the holding of existing licences after a given date by Indians, and it was also proposed to prohibit further coloured immigration ; but none of these Bills became law, the two regarding dealers' licences being refused the royal assent after reservation, and a commission of 1909 reported against the second project.[2]

In the Transvaal the irony of fate has produced a strange result; in 1885 the old republic passed a harsh law (No. 3) which refused Indians the citizenship, refused them landed property,

[1] There has been some contravention of the Act by corrupt practices ; see the report of a Select Committee on the Immigration Department C. 1, 1909.

[2] See *Assembly Debates*, xliv. 326–72, 455–62, 498–500 ; xlv. 1–5. 61–76. 131–43, 317 ; *Council Debates*, 1908, pp. 70–6, 84–96, 101–3.

and compelled them, if engaged in trade, to trade in locations, and compelled all Indians to be registered and pay a fee. The Act was the cause of complaints from the Imperial Government, but, after an arbitral award in 1895, only of friendly though urgent representations.[1] After annexation there was a demand in the Colony for further restrictions, but the whole position was summed up unfavourably to their contention by Mr. Lyttelton in a dispatch of July 20, 1904, in which he declined to do more than allow the passing of the usual legislation on the Natal lines. The following extract from that dispatch is of great importance :—[2]

In this dispatch,[3] Sir A. Lawley dwelt strongly on the danger with which the continued existence of the European commercial community in the Transvaal towns is threatened by the continued influx of Asiatic traders, with whom, owing to their lower standard of living, Europeans cannot compete, and on the consequent violent prejudice against the Asiatics which exists in every town of the Transvaal. He pointed out how in towns like Pietersburg the small European traders had been completely swamped by Indians, and contended that it depended upon the decision of the question of the position of Asiatics whether the Transvaal should remain in any sense a white man's country.

Two facts rendered immediate legislation imperatively urgent :—

1. The outbreak of plague in the Indian quarter of Johannesburg, illustrating the necessity for removing Indians to separate locations on sanitary grounds.

2. The fact that, as had been anticipated, a test case was being brought before the Supreme Court of the Transvaal to determine the validity of the old Boer Court's interpretation of Law No. 3 of 1885.

The final proposals of the Transvaal Government as set forth in that dispatch are that there should be introduced into the Legislative Council of the Transvaal—

(*a*) An Immigration Restriction Law on the lines of the similar Cape and Natal Acts, providing *inter alia* an education test for would-be immigrants, for the purposes of which Indian languages should not be accepted.

(*b*) A measure dealing with Indians on the lines of the Government Notice No. 356 of 1903, above referred to, providing :—

[1] *Parl. Pap.*, C. 7911.

[2] *Parl. Pap.*, Cd. 2239, pp. 44 seq.

[3] *Parl. Pap.*, Cd. 2239, No. 2.

(1) That those Asiatics who satisfy the Colonial Secretary of the Colony that their mode of living is in accordance with European ideas should be allowed to live, with their servants, outside locations, but not to trade outside locations unless they fall under (2).

(2) That those Asiatics who had established businesses outside locations before the war should not be disturbed.

(3) That with the two exceptions mentioned above all Asiatics should be required to live and trade in locations, and should be prohibited from holding land outside. This provision not to apply to land now set aside and used for religious purposes.

(4) All Asiatics entering the Transvaal, unless specially exempted, to take out a certificate of registration at a charge of £3.

(5) No restriction to be put on the issue of hawkers' licences, provided that the Immigration Law referred to above is passed.

You recommend the acceptance of these proposals by His Majesty's Government as being the maximum amount of concession which it is possible to make to the demands of the British Indians, in view of the state of public feeling on the matter.

On the fourteenth of May you telegraphed that the Supreme Court of the Transvaal in the test case brought before it had reversed the decision of the old Boer Court on the interpretation of Law No. 3 of 1885. The Supreme Court held that that law compelled Asiatics to reside but not to trade in locations.[1]

From this decision it follows that every Asiatic now resident in the Transvaal (except those brought in under indenture under a special Ordinance) is as free to carry on trade where he pleases as is a subject of English or Dutch origin, so that legislation of the kind now proposed by the Transvaal Government must be in diminution of existing rights. This fact, in my opinion, much changes the aspect in which the matter must be regarded by His Majesty's Government as the trustees of Imperial interests, including those of Indian subjects of the Crown.

On the other hand, the law of the Colony as so interpreted is, as I understand your dispatch, distasteful to the Transvaal public, who strongly desire to modify it adversely for British Indians who may in future enter the country, as well as for those who are now resident there.

[1] *Habib Motan* v. *Transvaal Government*, [1904] T. S. 404; cf. *Essop and Others* v. *Rex*, [1909] T. S. 480.

A plain distinction may be drawn between these two classes.

With respect to the first class—future immigrants—His Majesty's Government recognize that, for the reasons set out in your Dispatch, there is a strong opposition among the European population of the Transvaal to a continued and unrestricted influx of small traders and others of Asiatic race. The same feeling has already received expression not only in Australian and New Zealand legislation, but also in the Acts passed by the Legislatures of the neighbouring Colonies of the Cape and Natal within the last few years. His Majesty's Government, deeply as they regret the necessity of hindering the free movement of British Indian subjects within the Empire, feel that they are unable to withhold their sanction to the immediate introduction into the Legislative Council of the Transvaal of a measure restricting immigration on the lines of those Acts.

The adoption in this measure of a language test in a European language only, and the exclusion of the alternative test in a literary Indian language, will undoubtedly effect the purpose in view of limiting, and indeed will, as I believe, almost entirely check, the influx of British Indians and Asiatics into the country. The exclusion of this Indian literary test will, as you are aware, in all probability prevent the Indian Government from viewing favourably any scheme for the introduction of Indian labourers under indenture, but I understand that the Transvaal Government do not now press any such scheme, and I realize that something is to be said from the South African point of view of keeping the legislation in the various Colonies of South Africa on this subject as far as possible on a uniform basis.

With respect to the second class—British Indians—now resident in the Transvaal, who are confirmed by the decision of the Supreme Court in the rights for which His Majesty's Government have so long contended, the case is wholly different. Every rational precaution to safeguard the health of the community and of the British Indians themselves must of course be taken, and regulations securing this end with respect to their residence, and to the general treatment of their lower classes, carefully prescribed.

But an apprehended trade competition from the British Indians now in the country, whose number is now comparatively small, and will, under proposed restrictions on immigrants, be in a diminishing proportion, cannot be accepted as sufficient reason for the legislation proposed. His Majesty's Government have steadily declined to allow this

fear to influence their views in the past. On the contrary, for many years they repeatedly protested before the Empire and the civilized world against the policy and laws of the late South African Republic in relation to this subject.

Those laws were indeed only partially enforced, yet His Majesty's Government is now asked not merely to sanction their strict enforcement, but to set aside by legislation a judgement of the Supreme Court which has given to the British Indian rights for which His Majesty's Government have strenuously contended.

His Majesty's Government cannot believe that the British community in the Transvaal appreciate the true nature of the proposition which some of its members are pressing upon you. They, as Britons, are as jealous of the honour of the British name as ourselves, and even if a material sacrifice were necessary to vindicate that honour, I feel assured they would cheerfully make it. His Majesty's Government hold that it is derogatory to national honour to impose on resident British subjects disabilities against which we had remonstrated, and to which even the law of the late South African Republic, rightly interpreted, did not subject them, and they do not doubt that when this is perceived the public opinion of the Colony will not any longer support the demand which has been put forward.

The second Ordinance proposed, which will take the place of Law No. 3 of 1885, should, therefore, not interfere with the right of those now in the country to obtain licences to trade outside locations, but should be limited to creating the necessary machinery by means, I assume, of municipal Regulations for placing Asiatics in locations in accordance with the law, and should provide, in the case both of present residents and of new-comers, that those required to live in locations or bazaars should be so required for sanitary reasons in each case, whilst those of a superior class should be exempted and allowed to reside anywhere. With regard to the question of the holding of land, British Indians who are entitled to reside outside locations must at least have the right to acquire property in the premises which they occupy for business purposes.

His Majesty's Government are also anxious that the concessions which you favour respecting the exemption of Asiatics of the better class, including all respectable shopkeepers and traders, from humiliating disabilities under municipal and other regulations applying to coloured persons, should be secured as far as possible either under the new Ordinance or by means of the machinery already pro-

vided by Ordinance No. 35 of 1901 [1] if it can be adapted to that purpose.

There remains the question whether new-comers should be compelled without exception to trade in bazaars or locations. It seems certain that those who will come in under the proposed *Immigration Restriction Ordinance*, and they should be very few, will not be Asiatics of a low class, and will not, therefore, be such persons as could properly be required for sanitary reasons to reside in a special location. I am of opinion, that until it is proved that the *Immigration Restriction Ordinance* has failed to limit the influx to a minimum as it is expected to do, and in view of the absence of any legislation of the kind in the Cape Colony or Natal, the Ordinance to be passed in the present session should not limit the right of new-comers in respect of trade.

The two Ordinances which the Transvaal Government propose to pass during the present session of the Council should contain a suspending clause, or be reserved for the signification of His Majesty's pleasure.

As a matter of fact, all this time Asiatics were kept from re-entering the Colony under the *Peace Preservation Ordinance* No. 5 of 1903, which was merely a measure aimed at excluding persons likely to disturb the public peace. In 1906, just before responsible government, the Legislature passed an *Asiatics Law Amendment Ordinance*, requiring the registration of all resident Asiatics. The law was disallowed by the Imperial Government, but a similar law (No. 2) was at once introduced on the assembling of the first responsible-government Legislature late in that year, and passed unanimously in both Houses, so that the Imperial Government assented to it as 'they would not be justified in offering resistance to the general will of the Colony clearly expressed by its first elected representatives',[2] although Lord Elgin's dispatch went on to say that His Majesty's Government did not consider the position of natives lawfully resident in the Transvaal as settled by the Act satisfactory. Worse remained from the Indian point of view; an Act, No. 15 of 1907, was passed to restrict immigration, which was intended to exclude from

[1] This Ordinance was passed under Crown Colony Government to enable the Government to free coloured persons of superior status from the degrading restrictions necessarily imposed on ordinary coloured persons.

[2] *Parl. Pap.*, Cd. 3887, p. 9. Cf. Cd. 3251, 3308; H. C. 65, 1907.

the Colonies all Indians who had not already acquired a legal right to be there. Another section of the Act gave an absolutely discretionary power to the minister to remove from the Colony any person deemed on reasonable grounds to be dangerous to the peace, order, and good government of the Colony. The Imperial Government assented to the law in a telegram of November 27, 1907,[1] which runs as follows :—

November 27. No. 1. Your dispatch, September 9. The *Immigrants Restriction Act*, provisions of which are in some respects unusual, has received very careful consideration from His Majesty's Government. They note with some regret that your Ministers have not been content to rely on an education test for exclusion of undesirables and that practical effect of s. 2, subsection 4, will be to exclude all Asiatics, irrespective of their personal qualifications. In view of the past history of this question and the special circumstances of the Transvaal, they are nevertheless prepared to accept this provision, in the hope that exclusion of further Asiatic immigration will result in more favourable treatment of Asiatics now lawfully resident in the Colony. They assume that grant of temporary permits under *Asiatic Law Amendment Act*, s. 17, will not be discontinued, and they desire from your Ministers specific assurance that there is no intention of refusing access as visitors to ruling chiefs, Indians of distinguished position, or high officials of Asiatic descent.

By s. 6, subsection *b*, powers of expulsion of an unusually wide and unrestricted character applicable to foreigners and British subjects alike are conferred on the Executive. His Majesty's Government believe that no precedent for such powers exists in the legislation of any responsibly-governed dominion. Even the *Peace Preservation Ordinance*, passed under abnormal circumstances after prolonged war, does not confer actual power of expulsion. The exercise of such power by executive without intervention of judicial authorities is liable, in cases of subjects of foreign Powers, to give rise to very serious difficulties and, in case of British subjects, is contrary to traditional principles of policy. His Majesty's Government feel that these considerations have probably not been fully brought home to your Ministers, and hope that they will be prepared on reflection to put some limit on power conferred by this subsection on the Executive. They ask for assurance that legislation will be introduced limiting this power to persons convicted of some offence, or at any rate

[1] *Parl. Pap.*, Cd. 3887, p. 58.

providing means by which any such order may be brought before Courts for confirmation or discharge, and that your Ministers will refrain from exercising this power pending such legislation.

His Majesty's Government accept with some reluctance provisions of s. 6, subsection *c*, but they feel sure that discrimination will be exercised by your Ministers in employment of the powers conferred.

If your Ministers can give the two specific assurances asked for His Majesty will not be advised to disallow the Act.

The Ministry gave the assurances requested, and the Act became law. Since then the trouble with the Transvaal Indians has been lasting and difficult. There was resistance to the registration law, followed by a partial understanding, and the passing of a new Act, No. 36 of 1908, but the old Act remained still in existence; then there was a demand for the repeal of the immigration restriction law and the adoption simply of a Natal Act; then there was a demand for the permission for the settlement in the Colony of a few professional persons, and difficulties arose as to wives and children coming from India, while the expulsion in 1909 over the border into Lourenço Marques of persons deported from the Colony has caused great difficulties, and complaints have been made as to the treatment of prisoners by refusing them leave to observe their religious practices.[1]

Matters have also been complicated by misunderstandings of the intentions of the Government, apparently despite perfect good faith on both sides, Mr. Gandhi and Mr. Smuts taking different views of the result of these discussions. The question of deportation under the Act was discussed in the Courts, but it was held that the Crown had power under the Acts to deport to the country of origin of the persons deported,[2] the provisions of the Acts as regards registration and right of entry were upheld as was inevitable in the Courts,[3]

[1] See *Parl. Pap.*, Cd. 4327, 4584, 5363. In the Orange River Colony an Act of 1890 practically prevented any immigration while Ordinance No. 12 of 1907 provided for the exemption of coloured persons of distinction, and the question has thus been of no consequence.

[2] *Hong Kong and Leung Quin* v. *Attorney-General*, [1910] T. P. 348, 432. Cf. *Venter* v. *Rex*, [1907] T. S. 910.

[3] Cf. *Randeria* v. *Rex*, [1909] T. S. 65; *Naidoo and Others* v. *Rex*, ibid., 43;

and arrangements were made in 1909 direct with the Portuguese Government for the deportation of Asiatics via that territory. In the summer of 1909 the matter was discussed by Lord Crewe with Mr. Smuts and Mr. Gandhi, but nothing was done up to the coming into existence of the Union.

Since Union the Government of India has under the power given by an Act of 1910 decided to prevent immigration from India to South Africa with effect from July 1, 1911, on the ground that there is no security that the Indians will be allowed to become citizens of the Union if they so desire after the expiration of their indentures. On the other hand, the Government of the Union decided to meet the wishes of the Indians by passing an *Immigration Act* in 1911 on the usual method with a short language test, which on the Australasian model is based on dictation of fifty words in any language (not in theory necessarily European) in preference to the mere writing of an application in a European language of Natal and the Cape. At the same time Mr. Smuts has announced that the regulation would not prevent the entry of a few educated natives every year for the requirements of the community as regards law, medicine, and religion.[1]

§ 5. The Kanakas in Australia

There remains one case to be considered, that of the deportation of the Kanakas who were introduced into Queensland for the purpose of work on the sugar plantations. At first the introduction of these Pacific Islanders was conducted with much brutality, and kidnapping was common ; it was at last regulated in some measure by Imperial Acts of 1872 and 1875, and by Colonial Acts which it was hardly, however, possible adequately to enforce in the utterly barbarous condition of the islands. It was, however, felt in the south that a white Australia was essential, and the Commonwealth passed in 1901 an Act (No. 16) which arranged for the deportation of all Kanakas within a few years. Representations were

Magda v. *Registrar of Asiatics*, ibid., 397 ; *Ho Si* v. *Vernon*, ibid., 1074 ; *Chotabhai* v. *Minister of Justice and Another*, [1910] T. P. 1151 (reversed on appeal, 4 Buch. App. 305) ; *Ismail* v. *Rex*, [1908] T. S. 1088 ; *Lalloo* v. *Rex*, ibid. 624.

[1] See *Parl. Pap.*, Cd. 5579 ; 5582, p. 47.

made by the Aborigines Protection Society in favour of the natives, who were it was said civilized, and would be in great danger in going back to barbarous islands. This was borne out in part by Mr. Woodford, the Resident Commissioner of the Solomon Islands Protectorate, who pointed out in commenting on a petition presented to the Governor-General, and sent to him for his observations, that in many cases the natives having in Queensland contracted illegal marriages, or violated tribal customs, would be in danger in case of repatriation. Mr. Philp also, as Premier of Queensland, suggested that Kanakas who had been a long time in the Colony should be allowed to remain. The matter received the careful consideration of the Imperial Government, but they declined to interfere in a matter within the full discretion of the Commonwealth Government, and as a matter of fact the Commonwealth not only carried out the deportation with all consideration, but also modified in 1906 (No. 22) the Act of 1901, and allowed those who had really settled in the country to remain there.[1] The absence of the Kanakas has been made good by the payment of large bonuses on sugar produced by white labour.[2]

§ 6. The Present Position

The record of the Imperial Government in the matter of coloured races is satisfactory; the principle laid down of respect for treaties and for the rights of the Indian subjects of the King are obviously sound, and while the restriction on immigration is inevitable and in the interests of the Empire, everywhere except in South Africa the principle is being carried out that there shall be no discrimination between the resident Indian and the European population, and that even immigration shall not be prevented by direct legislation; it is significant that, despite all efforts, the Commonwealth Parliament has hitherto declined to prohibit mixed marriages,[3] and the Government of Western Australia

[1] See *Parl. Pap.*, Cd. 1285, 1554; Commonwealth *Parl. Pap.*, 1908, No. 173; Turner, *Australian Commonwealth*, pp. 25, 33–5, 52, 141.

[2] See Commonwealth *Parliamentary Debates*, 1910, pp. 4261 seq.

[3] Mr. Murphy introduced a Bill for this end into the Western Australia Parliament in 1910, but it was not passed. So Victoria Bills in 1910 and

have declined to legislate regarding the provision of separate carriages on the railway for natives. If only this spirit is maintained, in a reasonable period the native element in the country will be assimilated; half-castes are steadily becoming amalgamated with the rest of the people; those Chinese who wish to remain permanently in the country have no difficulty in obtaining white women as wives, and they are appreciated as husbands, and, though there may be objections to the practice, they disappear when it is realized that the cases are numerically very few, that there is no question of perpetuating a really coloured population, and that a gradual process of intermingling is now wisest for all parties. The blood of the country will not be appreciably affected by such admixture, and the dangers of two wholly alien races will disappear.[1]

The chief difficulty, indeed, which will arise in the future is that of the employment of lascars in merchant shipping in Australasian waters, against which both Australia and New Zealand feel strongly, and which they desire to see extinguished as far as the coasting trade at least is concerned.[2]

In South Africa the position is different; coloured immigration there does not threaten the purity of the race, but complicates the native problem, one of infinite and most regrettable complication, for which no solution is yet in sight.[3]

1911 were aimed at Asiatics in connexion with shearing of sheep, but were not passed. A New Zealand Bill of 1908 shared a like fate.

[1] The sympathy shown in August 1911 with the Chinese in cases of isolated assaults in New South Wales, and in a case of the compulsory deportation of a Chinese wife who had been temporarily admitted (*Age* August 3) is significant of the change of feeling since immigration became rare.

[2] See *Parl. Pap.*, Cd. 3567, pp. 108–16; 5745, pp. 399–409; New Zealand *Parl. Deb.*, cliii. 695–72, 835, 836, 871. The Queensland Royal Commission on pearl shell and bêche de mer reported in 1908 (Report, p. 62) that white labour should be substituted for coloured labour in the fisheries, but no action has been taken; and in the Queensland Parliament in 1910 it was urgently asserted that only by the aid of Japanese could the industry be pursued at all. These Japanese are permitted to enter for a temporary purpose only by the Commonwealth Government. See *Parliamentary Debates*, 1910, pp. 1585 seq.

[3] See Mr. Malan in Cd. 5745, pp. 409, 410.

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